UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT 70 AND LOCAL LODGE 839 (SPIRIT AEROSYSTEMS)

Case 14-CB-133028

and

RYAN KASTENS, an Individual

and

SPIRIT AEROSYSTEMS

COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE ERRATA AND AMENDED DECISION, OR IN THE ALTERNATIVE, MOTION TO CORRECT THE ORIGINAL DECISION

By Motion dated July 31, 2015, Respondent seeks to strike the *Errata* and *Amended Decision* issued by Administrative Law Judge Michael A. Rosas on May 5, 2015, that corrected an obvious omission from the original decision issued by ALJ Rosas on April 29, 2015. Counsel for the General Counsel opposes Respondents' Motion to Strike Errata and Amended Decision ("Motion") on two grounds. First, contrary to Respondents' argument, the ALJ's issuance of an erratum in these circumstances falls within the guidelines set forth by the National Labor Relations Board (the "Board"). Second, Respondents' Motion should be denied because it is clearly an attempt to circumvent the Board's Rules and Regulations. Finally, in event that the Board grants Respondents' Motion to Strike, Counsel for the General Counsel requests that the Board treat this Response in Opposition as a Motion to Correct the April 29, 2015 decision issued by ALJ Rosas.

ANALYSIS

1. THE ERRATA ISSUED BY JUDGE ROSAS COMPORTS WITH GUIDELINES SET FORTH BY THE NATIONAL LABOR RELATIONS BOARD.

An administrative law judge may, after issuing a decision, make corrections to that decision through the use of an erratum. *Wilco Business Forms,* 280 NLRB 1336, 1336 n. 2 (1986). *See also* National Labor Relations Board Division of Judges Bench Book, § 2-300. Section 2-300 of the Bench Book sets forth two situations in which an administrative law judge may issue an erratum: (1) "to correct material typographical errors" and (2) "to correct obvious omissions" that are "explicitly encompassed by what has been said in the decision."

In its *Brief to the Administrative Law Judge* at page 41, Counsel for the General Counsel sought the usual make-whole remedy for a violation of Section8(b)(2). Exhibit A. In this instance, the *Errata* issued by Judge Rosas merely corrected the obvious omission of *any* remedy for the Section 8(b)(2) violation. Contrary to Respondents' argument, the instant case does not involve a substantive change to the original decision, distinguishing it from the facts in *Wilco Business Forms*, 280 NLRB 1336 (1986). In that case, the ALJ's errata made additional conclusions of law that the Employer had discriminated against specific employees who had been inadvertently left out of the original decision. *Id.* at 1336, n.2. In the instant case, ALJ Rosas made no additional conclusions of law. Rather, through the *Errata* and *Amended Decision*, Judge Rosas merely corrected an obvious omission and provided the usual and appropriate remedy for an 8(b)(2) violation. *See, e.g., Town and Country Supermarkets*, 340

NLRB 1410, 1417 (2004) (ordering Union to make whole the discriminatee after finding Union violated 8(b)(2) of the Act by seeking discriminatee's discharge).

2. RESPONDENTS' MOTION IS AN ATTEMPT TO CIRCUMVENT THE BOARD'S RULES AND REGULATIONS

Respondents' Motion should be rejected because it is a blatant attempt to circumvent the Board's Rules and Regulations. Section 102.46(a) of the Board's Rules and Regulations provides that "exceptions to the administrative law judge's decision or to any other part of the record or proceedings" along with any brief filed in support of the exceptions must be filed with the Board within 28 days from the date of service of the order transferring the case to the Board. Section 102.46(j) also mandates that any brief filed in support of exceptions "shall not exceed 50 pages in length."

Based upon these Rules and Regulations, Respondents' Motion should be denied because it is untimely. The parties' exceptions and supporting briefs were due on May 27, 2015. Respondent filed a Motion for an Extension of Time to File Exceptions on May 15, 2015, and all parties were granted an extension of time to file exceptions until June 10, 2015. Respondents' exceptions and supporting brief were timely filed. However, Respondents' Motion to Strike the Errata and Amended Decision was filed on July 31, 2015, nearly fifty days after the deadline for filing exceptions. Respondents had ample opportunity to address the *Errata* and *Amended Decision* in its exceptions and supporting brief, which they did. The instant Motion which only expands upon arguments made in Respondents' exceptions and supporting brief is clearly untimely.

Moreover, Respondents' Motion is merely an attempt to circumvent the Board's Rules and Regulations on page limits. The Board's Rules and Regulations limit the Brief in Support of Exceptions to fifty pages. Through the instant Motion, Respondent has exceeded the fifty page limit provided by the Board to address the exceptions by seven pages.

This is not an instance where Respondents did not have ample opportunity to respond to the *Errata* and *Amended Decision* issued by Judge Rosas. In *Respondents' Exceptions to the Decision and Order of the Administrative Law Judge*, Exception No. 67 specifically addresses the ALJ's use of the errata. Exhibit B. Respondent also took issue with the ALJ's use of the errata in its supporting brief. *See* Memorandum Brief in Support of Respondents' Exceptions To The Administrative Law Judge's Decision, at 28 n. 13. Exhibit C. Nearly seven weeks after Respondents' exceptions and supporting brief were due, Respondents are attempting to take another bite at the apple and address this issue again in the form of a Motion. Counsel for the General Counsel requests the Board deny Respondents' Motion on the grounds that it is a flagrant disregard of the Board's Rules and Regulations.

3. GENERAL COUNSEL MOVES THE BOARD TO CORRECT THE ORIGINAL APRIL 29, 2015, DECISION TO COMPORT WITH THE ERRATA

In the event that the Board finds that the use of the *Errata* to correct the original decision was improper, Counsel for the General Counsel moves the Board to treat this Response in Opposition as a Motion for Correction to the Board.

As Respondent noted in its Motion, the Bench Book states that a party seeking a substantive change to a decision or recommended order should do so by filing exceptions or by

motion to the Board. In this case, however, Counsel for the General Counsel relied upon the *Errata* and *Amended Decision* when making the determination not to file exceptions to the ALJ's original decision. In *Wilco Business Forms*, 280 NLRB at 1336 n.2 (1986), where the Board found that the ALJ lacked the authority to issue an erratum that amended the judge's conclusions of law, the Board granted the General Counsel's motion for correction. In making that decision, the Board noted that Respondent had sufficient opportunity in its brief to respond to the judge's decision.

As stated above, Respondent, in this case, has had ample opportunity to respond in its brief and in this instant motion to the ALJ's *Errata* and *Amended Decision*. Counsel for the General Counsel requests that in the event that Respondents' Motion is granted the Board then treat this Response in Opposition as a Motion for Correction of the ALJ's April 29, 2015, decision.

CONCLUSION

For the foregoing reasons, Counsel for the General Counsel respectfully requests that the Board deny Respondents' Motion or in the alternative treat this Response in Opposition as a Motion to Correct the original decision.

Dated: August 10, 2015

Respectfully submitted,

/s/ Julie Covel

Julie Covel
Counsel for the General Counsel

STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing Counsel for the General Counsel's Opposition to Respondents' Motion to Supplement the Record pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Executive Secretary with service by electronic mail on the parties unless otherwise indicated.

Dated: August 10, 2015 **/s/ Julie Covel**

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUBREGION 17

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT 70 AND LOCAL LODGE 839 (SPIRIT AEROSYSTEMS)

Case 14-CB-133028

and

RYAN KASTENS, an Individual

and

SPIRIT AEROSYSTEMS

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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EXHIBIT A

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Cases

I. STATEMENT OF THE CASE

This case was heard by Administrative Law Judge Michael A. Rosas on February 19-20 and 26-27, 2015, in Wichita, Kansas, based on a complaint alleging that International Association of Machinists and Aerospace Workers, AFL-CIO, District 70 (District 70) and Local Lodge 839 (Local 839) (collectively Respondent) violated Section 8(b)(1)(A) of the National Labor Relations Act by threatening Ryan Kastens with bodily injury and by threatening to impede his efforts to obtain reinstatement; violated Section 8(b)(1)(A) and (2) by attempting to cause and causing Spirit to discharge Ryan Kastens and Jarrod Lehman; and violated Section 8(b)(1)(A) by discriminatorily processing Kastens' grievances.

As described below, record evidence clearly demonstrates that Respondent violated the Act as alleged. As a result of Kastens' and Lehman's dissident activity, Respondent attempted to cause and, eventually did cause their employer, Spirit Aerosystems, Inc. (Spirit), to discharge them. Credible evidence not only demonstrates that, on January 27, 2014, Respondent's agent Howard Johnson initiated an investigation into Kastens' and Lehman's e-mail activities without any legitimate reason to explain his action, but it also clearly shows that Johnson's action was but one of several attempts by Respondent's representatives to get Spirit to initiate an investigation into Kastens' and Lehman's activities. Thereafter, on April 11, 2014, Johnson and a number of Respondent's other representatives attempted to interfere with Kastens while he campaigned on behalf of rival Presidential candidate Jay Cronk at Spirit's facilities. Respondent's representatives not only called Spirit's security officers to have Kastens' removed from Spirit's property, but, as alleged in the Complaint, Johnson also threatened to physically assault Kastens and threatened his ability to obtain reinstatement with Respondent. Finally, credible demonstrates that Respondent discriminatorily and arbitrarily processed Kastens'

outstanding suspension and discharge grievances because of his dissident activities. Although Kastens had three outstanding grievances, the record clearly establishes that Directing Business Representative Frank Molina made no sincere effort to investigate and resolve Kastens' grievances, instead abandoning them in exchange for a small monetary payment while withholding evidence from Kastens and Respondent's legal counsel.

II. STATEMENT OF FACTS

A. Respondent's Organization

International Association of Machinists and Aerospace Workers District 70 represents employees at approximately twenty companies across the state of Kansas. *T. 25.* Together with Local Lodge 839, District 70 represents a bargaining unit of approximately 7,000 employees at a facility operated by Spirit in Wichita, Kansas. *T. 26-28.* District 70 and Local Lodge 839 jointly administer a collective-bargaining agreement covering the Spirit employees' terms and conditions of employment. *Id.* The current collective-bargaining agreement became effective on June 26, 2010, and remains in effect until June 27, 2020. *T. 27; Jt. 1.*

President and Directing Business Representative Frank Molina is District 70's presiding officer. *T. 25.* Molina is assisted by Becky Ledbetter, whom he appointed as Assistant Directing Business Representative following his election, Secretary-Treasurer Lynne Strickland, six business representatives, and two organizers. *T. 26.* In addition to a group of local officers, Local 839 maintains two in-plant representatives who report directly to District 70 and are responsible for processing Spirit employees' grievances at the early stages of the grievance process. *T. 31, 288-289.* Tim Johnson is the first shift in-plant representative, and Howard Johnson served as the

second shift in-plant representative until Molina appointed him to be an organizer in March 2014. *T. 288.*

B. Kastens' and Lehman's Dissident Activity

Ryan Kastens and Jarrod Lehman were each employed by Spirit. *T. 28, 126, 233.* Kastens began his employment on January 8, 2010, and held the classification of fuel cell sealer. *T. 126.* Lehman began his employment on October 26, 2007, and worked as an underwing mechanic. *T. T. 233.*

Throughout their employment with Spirit, Kastens and Lehman were active members of District 70 and Local Lodge 839. *T. 28, 126, 233.* Kastens served as a union steward throughout 2012 and held positions on various union committees. *T. 127, 176.* During his employment, Lehman served as Local 839's President and Vice President, and, following an appointment by Molina's predecessor, Steve Rooney, served as a Joint Partnership Advocate, where he reported to the Directing Business Representative, first Rooney and then Molina. *T. 236-240.*

By January 2014, Kastens and Lehman had each taken political positions that were squarely at odds with Respondent's incumbent leadership. Whereas Lehman attempted to unseat Howard Johnson as Local 839's in-plant representative during the 2013 elections, Kastens had become an advocate for the reform slate of candidates in the impending Machinists' International Election. Furthermore, according to Molina, Kastens had become an outspoken critic of District 70's organizing policies. *T. 89.*

Kastens' dissident activity began to take form in November 2013, when Karen Ascension, a vice presidential candidate in the Union's International election, attended a meeting at Local 839 to speak on behalf of the reform candidates. *T. 154.* Kastens attended the meeting

along with the staffs of District 70 and Local Lodge 839 and, for the first time, learned that Jay Cronk was attempting to unseat Machinist's International President Thomas Buffenbarger in the upcoming election. *T.154.* Although Kastens was impressed by Ascension's presentation, his opinion was not universal. Howard Johnson interrupted Ascension's presentation, yelling at Ascension and imploring her to leave because she would not be receiving the union members' support. *T. 154-155.* Although Kastens attempted to intervene and escort Johnson from the building, Johnson refused and continued to interfere with Ascension's presentation. *T. 154-155.* Following the meeting, Kastens met with Directing Business Representative Molina and advised him that he felt that Johnson's actions were inappropriate. Although Kastens asked Molina to address the matter with Johnson, it is not clear whether Molina ever spoke with Johnson about his actions. *T. 155.*

Soon thereafter, however, Molina began communicating with Kastens about his support of Ascension and Cronk, whom Kastens began communicating with on Facebook. *T. 205.* In early December 2013, Molina sent a text message to Kastens telling him that he heard that Kastens was campaigning for Ascension. *T. 156.* Although Kastens acknowledged taking Ascension's campaign literature, he denied campaigning for her. *T. 156.* Several weeks later, Molina called Kastens and again reported hearing rumors that Kastens was supporting Ascension and Cronk. Although Molina described the reform candidates in unflattering terms, Kastens responded that he had the right to support the candidates, and Molina could not tell him otherwise.[1] *T. 157.*

[1] Although Molina denied warning Kastens against supporting Cronk and Ascension, he admitted that in November or December 2013, he learned that Kastens supported the reform candidates. *T. 94-95, 559.*

As addressed in greater detail below, Respondent's animosity toward Kastens' activity was clearly demonstrated on April 11, 2014,[2] when Kastens accompanied Jay Cronk to Spirit's facility to distribute campaign material. *T. 157, 205-207.* After Kastens and Cronk arrived at Spirit and began distributing literature in support of Cronk's Presidential bid, Howard Johnson and a number of District 70 representatives arrived at the gate and attempted to interfere with Kastens' and Cronk's activity. *T. 157-159, 207-209.* When Kastens asked Howard Johnson to leave Cronk alone, Johnson threatened to beat Kastens' ass and told Kastens that he would see that Kastens never got his job back. *T. 159, 209.* Although Kastens' and Johnson's confrontation did not escalate to a physical confrontation, on April 14 Kastens went to the Sedgwick County Courthouse and filed a petition for a temporary restraining order against Johnson, obtaining a Final Order of Protection from Stalking against Johnson on May 1. *T. 163-164, 167-168; GC 4; GC 5.*

As with Kastens, Howard Johnson was well known to Lehman even before Johnson reported his e-mail activity to Spirit in January 2014. Lehman served as a steward for Local 839 from 2008 until 2011, and during this period he worked directly with Johnson in his role in-plant representative. *T. 234-235.* Although Lehman initially enjoyed a good relationship with Johnson, he perceived a change in their relationship during his term as Vice President.[3] *T. 235.* On one occasion, while Johnson and Lehman were discussing an issue at Local 839's office, Lehman addressed their icy relationship, asking Johnson to explain why he had a problem with him. *T.*

[2] Unless otherwise indicated, all dates reference 2014.
[3] Lehman was Vice President of Local 39 from January 2012 until June or July 2013. T. 236.

235. In response, Johnson claimed full responsibility for Lehman's success within Respondent's organization and accused Lehman of being a cocky little shit.[4] *T. 235.*

In June or July 2013, Lehman attempted to unseat Johnson as in-plant representative at the request of Steve Rooney, Frank Molina's opponent in the election for Directing Business Representative. *T. 236-237.* Although Molina and Johnson prevailed in the election, Lehman remained in his position as Joint Partnership Advocate and began reporting to Molina.[5] *T. 237-238.* Lehman soon resigned from the position, however, because Molina refused to return his calls. *T. 239.*

C. Kastens' and Lehman's Suspension and Discharge

On January 27, Lehman received an e-mail, which was captioned, "Why you should always look both ways." The e-mail included a video showing a collision between a vehicle and a scooter on a street directly adjacent to one of Spirit's parking lots. *T. 249; Jt. 20; GC 8; GC 24.* Lehman forwarded the e-mail to six or seven employees including Kastens and also copied two individuals outside Spirit. *T. 259; GC 8; GC 24.* Upon receiving Lehman's e-mail, Kastens forwarded the e-mail and video to numerous fellow employees, several union members, and his immediate family, adding the remark, "Wonder why those of us here at spirit never heard about this...." *T. 150; GC 8; GC 24.*

Upon receiving Kastens' e-mail, Assistant Directing Business Representative Ledbetter forwarded the e-mail to Respondent's representatives Jason Baze, Howard Johnson, and Kenneth Tullis. *T. 324-326, 334; GC 24; R 12.* After viewing the video, Howard Johnson then sent the e-

[4] Counsel for the General Counsel moves to correct the transcript at page 235, line 19, to reflect that Johnson called Lehman a cocky little shit instead of a "coffee" little shift. Johnson did not deny making these remarks.
[5] Contrary to Molina's unsupported testimony, Lehman testified that he was never fired by Rooney or appointed by Molina. T. 238.

mail and video to Jeff Black, a Spirit labor relations representative, adding the note, "We were told that this video shouldn't have been released....im getting calls about this, people are forwarding this message internally as well as outside spirit. What is the deal with this video?" *T. 291-294; GC 8.* Spirit's records demonstrate that Black forwarded Johnson's inquiry to Spirit's Senior Manager Lisa Atcheson, who in turn contacted Spirit's Security Department to initiate an investigation. *GC 8; T. 274-278, 329.*

Near the end of Kastens' shift on February 13, Spirit suspended him and escorted him from its property. *T. 29, 143-144.* The following day, Lehman was also suspended. *T. 29, 240.*

Kastens and Lehman both filed grievances concerning their suspensions on February 14. *Jt. 6; Jt. 15.* Although Kastens did not speak with a business representative when he initially filed his grievance at District 70's office, Directing Business Representative Molina sent Kastens a text message on February 15, informing Kastens that he was attempting to learn the reason that he had been suspended. *T. 145-147.* Lehman spoke with Becky Ledbetter when he filed his grievance, and, although Ledbetter advised Lehman that she did not know why he had been suspended, she promised that Respondent's representatives would get to the bottom of it. *T. 241, 265.*

Late the following week, Kastens finally gained some insight into the basis for his suspension when Molina called him and informed him that his suspension involved an e-mail incident involving over thirty people. *T. 148.* Although Molina did not further elaborate, he promised Kastens that he would contact him with any further details. *T. 148.*

Lehman finally learned about the reason for his suspension on February 24, when he attended a meeting at Spirit's security office. *T. 241.* Spirit's security officers showed Lehman a

copy of his e-mail, interviewed him, and Lehman signed a typed statement in which he acknowledged sending the video to employees and individuals outside of Spirit. *T. 241-244; GC 20.* Members of Spirit's security department subsequently interviewed Kastens on February 25 about his involvement in forwarding the video. *T. 149-150.* Like Lehman, Kastens provided a signed statement in which he acknowledged his actions. *GC 2.*

Following their interviews, Lehman and Kastens continued serving their suspensions. During this period, a member of Spirit's security office telephoned Lehman, and, about March 3, Lehman submitted to a second interview. *T. 244-245; GC 13.* Lehman's second interview focused on a comment and a picture that he posted on his personal Facebook account. *T. 245.* Although Lehman acknowledged posting a comment that asked if he needed to cut somebody, he could not recall any specifics about the comment other than that it was not work related or anything other than a figure of speech. *T. 245, 263-264.* Although Lehman searched his Facebook account to identify the photograph in question, he was unable to do so and informed the officer of that fact. *T. 245.*

Spirit's security office subsequently issued a report concerning the allegations that Kastens and Lehman sent a Spirit video to individuals outside of Spirit. *GC 8; T. 274-278, 329.* Thereafter, Spirit's security office issued a second report "based on information received by the HR Discipline Office February 28, 2014" concerning two posts on Lehman's personal Facebook account that had been received "from a person wishing to remain anonymous." *GC 13.*

As a result of the investigations, Spirit discharged Kastens and Lehman on March 5 and 6, respectively. Kastens' discharge notice provides:

> Ryan, an investigation has revealed that you forwarded an e-mail external to the Company which contained a Spirit video. This behavior is unacceptable and will

> not be tolerated.... Ryan, on 12/6/13 you were issued a suspension which indicated that if you received any type of discipline in the next 12 months, you would be terminated for generally acceptable conduct. As a result of this investigation, your employment with Spirit Aerosystems, Inc. is terminated effective immediately. *T. 151; Jt. 7.*

Lehman's discharge notice provides:

> Jarrod, an investigation revealed that you forward[ed] an e-mail external to the Company which contained a Spirit video. You also had a picture posted on your Facebook account of you which was taken in a Spirit shop area. This behavior is unacceptable and will not be tolerated.... Jarrod, as a result of these investigations, you are being terminated. *Jt. 9.*

D. The Disposition of Kastens' and Lehman's Grievances

Directing Business Representative Molina assumed responsibility for processing Kastens' and Lehman's grievances even before their suspensions were converted to terminations.[6] *T. 36, 87.* On February 27, Molina submitted written requests for information concerning Kastens' and Lehman's grievances to Spirit's Director of Labor Relations Jeff Clark.[7] *T. 37, 40, 548-550; GC 7.* Clark responded to Molina's requests by email dated March 13, indicating that he had responsive information. *GC 9; T. 41-42.* Molina subsequently met with Clark and received the requested information.[8] *T. 42.*

After receiving the information concerning Kastens' and Lehman's discharges from Spirit, Molina instructed his assistant to send his entire grievance file to District 70's attorney Tom Hammond, and Molina asked Hammond to review the documents. *T. 86-87, 496, 553.*

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[6] Molina's conflicting testimony concerning when he assumed responsibility for Kastens' grievance will be addressed in greater detail below.

[7] Molina's assistant sent courtesy copies of his request to among others Becky Ledbetter. *T. 38.*

[8] Although Molina acknowledged receipt of the Spirit security office report concerning Lehman's Facebook activity (GC 13) along with the report concerning Kastens' and Lehman's e-mail activity, *T. 66-67*, he testified that the report concerning the employees' e-mails did not include the page demonstrating that Howard Johnson was responsible for transmitting Kastens' and Lehman's e-mails to Spirit (GC 17). *T. 48-54, 83.* Instead of showing that Johnson sent Kastens' and Lehman's e-mails to Spirit, the report included the handwritten notation "Deleted Source Material." *T. 49, 57, 83; GC 17.*

Thereafter, sometime before April 1, Hammond contacted Molina and offered his opinion on the merits of Kastens' and Lehman's grievances. *T. 493.* After speaking with Hammond, Molina independently reviewed past arbitration decisions concerning last chance agreements and determined that District 70 would not pursue Kastens' grievance to arbitration. *T. 73, 74, 97, 114-116, 554-555; R 11.*

In late March, Molina turned his attention to attempting to settle Kastens' and Lehman's grievances. *T. 73, 555.* Molina testified that he initially tried to get Spirit to have mercy on Kastens and Lehman. To that end, Molina met with Labor Relations Manager Clark and Vice President Justin Welner to determine whether Spirit was serious about discharging them. *T. 74-76, 100-102, 562, 569-570.* After Spirit rejected Molina's requests for reinstatement and his appeal for last chance agreements, Molina offered to resolve the grievances in exchange for payment of $50,000 to each employee. *T. 76, 99-100, 562-563.* According to Molina, Spirit rejected his offer, thereby leading to negotiations that ultimately led to the final settlement. *T. 76, 562-563.*

By May 8, Molina and Spirit reached agreements to resolve Kastens' and Lehman's grievances. *T. 77-78; GC 15, p. 1.* Although Spirit proposed seeking Kastens' and Lehman's signatures on the agreements to "take[] away the risk of any future liability for both our organizations," after sending the agreement to Molina for his approval, Spirit agreed to remove the grievant releases so that Kastens and Lehman would not be required to sign the settlement agreements. *T. 77-78; GC 15, pp. 1-2.* Once the agreements were finalized, Molina sent the settlements to Kastens and Lehman by mail on May 23. *T. 80, 152; Jt. 8.* As a result of the settlement, District 70 withdrew Kastens' and Lehman's grievances, and Spirit paid Kastens $2,000 and Lehman $5,000. T. 152.

Upon receiving his settlement check, Kastens immediately called Molina, informing Molina that he was not happy and that he wanted his grievance to proceed to arbitration. *T. 153.* Molina replied that it would be a waste of time because Kastens signed a last chance agreement. *T. 153.*

III. ARGUMENT AND ANALYSIS

A. Statement of the Issues

Credibility resolutions will be a vital factor in determining whether Respondent violated the Act, as alleged in the Complaint. Although there are a number of facts that are not in dispute, the context surrounding Respondent's actions are critical to analyzing whether Respondent threatened Kastens in violation of Section 8(b)(1)(A); whether Respondent attempted to cause and caused Spirit to discharge Kastens and Lehman in violation of Section 8(b)(1)(A) and (2); and whether Respondent violated Section 8(b)(1)(A) by accepting a small monetary offer to abandon Kastens' outstanding grievances. Although Respondent's witnesses either denied the allegations or attempted to cast their actions in a nondiscriminatory light, the overwhelming weight of the evidence demonstrates Respondent's lack of good faith and clear hostility toward Kastens and Lehman. As explained below, the record clearly establishes that Respondent threatened Kastens because he was engaged in protected activity, attempted to cause and caused Spirit to discharge Kastens and Lehman, and acted in bad faith in refusing to process Kastens' grievances.

B. Respondent Violated Section 8(b)(1)(A) by Threatening Kastens

1. Credible Evidence Demonstrates that Howard Johnson Threatened Kastens

On April 11, Jay Cronk arrived in Wichita and met Kastens, who agreed to show him a place to handbill at Spirit's facility. *T. 205-206.* Kastens and Cronk traveled to an entrance gate at Spirit's property at approximately 1:00 or 1:30 p.m., stationed themselves on opposite sides of the gate, and began distributing campaign literature to employees. *T. 157, 206-207.* Approximately thirty minutes after Kastens and Cronk arrived, District 70 representatives Howard Johnson, Becky Ledbetter, and Juan Eldridge also arrived at the gate. *T. 157-158.* Ledbetter approached Kastens and began speaking to him about his decision to support Cronk. After telling Ledbetter that he had the right to campaign for his candidate, Kastens left his station to attend to Cronk, who was involved in an exchange with Johnson and Eldridge on the other side of the entrance gate. *T. 158.* Upon arriving at the other side of the gate, Kastens initially exchanged peaceful remarks with Eldridge while Johnson continued addressing Cronk less peacefully. *T. 158-159, 189.* Thereafter, Kastens approached Johnson and advised him that he was interfering with Cronk's lawful campaign activity. *T. 159.* Johnson responded, telling Kastens to "[s]hut up before I beat your ass." Johnson then told Kastens that he would never be anything in the Union and that he would see that Kastens never got his job back. *T. 159, 189, 209.* In response to Johnson's remarks, Kastens placed his hands behind his back and implored Johnson to hit him. *T. 159, 209.* Before the communications between Johnson and Kastens devolved further, District 70 Joint Partnership Advocate Austin Ledbetter interceded and separated Kastens and Johnson. *T. 159.* Kastens then stepped away from the situation and called the Department of Labor to report the incident. *T. 160.* Shortly thereafter, a Spirit security

officer arrived at the scene, and informed Kastens and Cronk that they needed to remove their cars from Spirit's parking lot. *T. 160, 209-210.*

2. Respondent's Evidence Does Not Corroborate Johnson's Denials

Although no one disputes that Kastens and Johnson engaged in a confrontation on April 11, Respondent called a number of witnesses in an effort to contradict Kastens' and Cronk's testimony that Johnson threatened Kastens. For his part, Johnson denied that he threatened Kastens in any manner, *T. 305-306.* According to Johnson, Kastens approached him from the opposite side of the entrance gate, got in his face, and without any provocation began yelling, "Hit me, hit me, hit me, got my hands behind my back. Hit me, hit me, hit me, hit me." *T. 304, 306-307.* Johnson thereafter responded to Kastens' pleas by telling him, "I will get you – you know.... I'm not hitting you. I'll see you tomorrow." *T. 304-305.*

Despite the number of Respondent's representatives who claimed that they did not hear Johnson threaten Kastens, none of them explicitly contradicted Kastens' testimony that Johnson threatened him. District 70 Business Representative Juan Eldridge, who traveled to Spirit with Johnson and Ledbetter, testified that he was speaking with another employee when he first noticed the altercation between Johnson and Kastens, and he did not hear what, if anything, was said before he heard Kastens daring Johnson to hit him. *T. 407-408, 410-411.* According to Becky Ledbetter, once Kastens ventured to the opposite side of the entrance gate to speak with Johnson, she could not hear them. *T. 364-367, 374-375.* District 70 Business Representative Stephen Elder testified that, when he arrived at Spirit and began walking toward the entrance gate, he observed Johnson and Kastens standing approximately 15 feet apart while Kastens challenged Johnson to hit him and Johnson yelled that Kastens was not allowed on Spirit's

property. *T. 420-421.* District 70 Business Representative Brent Allen also observed Kastens and Johnson engaged in a discussion when he arrived at Spirit, and, although he was not close enough to hear what Johnson said to Kastens, he observed Kastens yelling at Johnson to hit him. *T. 430-432, 435.* Like Respondent's other witnesses, Austin Ledbetter also saw Kastens and Johnson exchange words before he observed Kastens place his hands behind his back and implore Johnson to hit him. *T. 443-445.*

In addition to being unable to rebut Kastens' testimony, none of Respondent's other witnesses' testimony support Johnson's claim that he did not do or say anything to provoke Kastens' reaction. Furthermore, considering the discrepancies in recollection between Respondent's witnesses, one would be hard pressed to conclude which one of Respondent's witnesses to credit even if they had contradicted Kastens. For example, whereas Eldridge testified that Kastens spoke with him before Kastens began speaking with Johnson, *T. 403-404, 407, 413*, both Johnson and Becky Ledbetter testified that Kastens immediately approached Johnson.[9] *T. 303-304, 306-307, 363-364.* Although other witnesses placed Kastens and Johnson face to face, Stephen Elder testified that Kastens and Johnson were approximately 15 feet apart when Kastens began telling Johnson to hit him. *T. 420.* And, even though Johnson claimed that he did not do anything to provoke Kastens, and Eldridge testified that Johnson stood calmly with his thumbs in his pockets as Kastens yelled at him, *T. 307, 408, 411*, former District 70 Joint Partnership Advocate Austin Ledbetter acknowledged that tensions were running high between Kastens and Johnson to the point that he felt it necessary to diffuse the situation. *T. 442, 453.*

[9] Ledbetter testified that Kastens crossed five lanes of traffic and "zeroed in on [Johnson] and there was no turning back." T. 364.

3. Independent Evidence Demonstrates that Johnson Threatened Kastens

Ultimately, the weight of the evidence supports Kastens' testimony that Johnson threatened him. Aside from the inherent implausibility of Johnson's claim that he did not say or do anything to provoke Kastens' response, credible evidence disputes his claim. Contrary to Johnson's testimony that Kastens' reaction was completely unprovoked, Spirit's Lead Security Officer Gerald Randolph testified that, when he arrived at the gate, he witnessed Johnson and Respondent's other representatives making comments toward Kastens, who remained silent except when addressing Randolph. *T. 477, 479-480.*

More significantly, to credit Johnson's claim that he did not do or say anything to provoke Kastens one must also believe his assertion that he went to Spirit for the sole purpose of campaigning. *T. 307.* This is clearly not true, as Respondent's representatives clearly went to Spirit to interfere with Kastens' and Cronk's activities. To his credit, Austin Ledbetter admitted this fact, explaining that he went to Spirit because he received several calls reporting that Kastens was at Spirit campaigning. *T. 447-448, 450-451.* Ledbetter not only immediately traveled to Spirit in response to the news, but he also called Spirit's Security Office twice in an effort to have Kastens and Cronk removed from Spirit's property. *T. 451-452.*

Although none of Respondent's other witnesses admitted the real reason that a large number of District 70 officers simultaneously arrived at Spirit while Kastens and Cronk were attempting to distribute campaign literature, their motive becomes clear when one considers their actions after Cronk and Kastens left the area and began walking toward their vehicles. Brett Allen and Austin Ledbetter testified that they stuck around to observe Kastens and Cronk to make sure that they left Spirit's property. *T. 435-437, 447-448.* Becky Ledbetter testified that she

immediately departed along with Johnson and Eldridge. *T. 375.* Likewise, despite having just arrived at Spirit, Stephen Elder simply got in his vehicle and left after Kastens and Cronk departed.[10] *T. 422, 426.*

It is also notable that within days of the incident, Kastens went to the Sedgwick County Courthouse and filed a petition for a temporary restraining order against Howard Johnson, and, thereafter obtained a Final Order of Protection from Stalking to prohibit Johnson from communicating with him. *T. 163-164, 167-168; GC 4; GC 5.* Considering that Kastens had not filed an unfair labor practice charge against Respondent at the time he sought the protective order, his actions corroborate his testimony that Johnson threatened to "beat his ass" and ensure that he did not get his job back.

4. Johnson's Threats Are Attributable to Respondent

In determining whether statements violate Section 8(b)(1)(A), the Board uses an objective test and does not attempt to discern whether the employee was actually coerced or restrained by the alleged threats. See *Steel Workers Local 1397*, 240 NLRB 848, 849 (1979). A threat of physical violence is clearly conduct which is likely to coerce and restrain employees in the exercise of their Section 7 rights. See *YKK (U.S.A.) Inc.*, 268 NLRB 82 (1984) (sustaining objections based on threats of physical violence by union representatives during the critical period); *Electrical Workers Local 309*, 212 NLRB 409, 414 (1974) (finding violation of 8(b)(1)(A) based on threats of violence directed at traveler). Likewise, a union violates Section 8(b)(1)(A) when an agent threatens to seek the discharge of an employee or tells an employee

[10] Although Elder testified that he left the gate because shift change was over, *T. 426*, Ledbetter testified that the District 70 officers left the area because security instructed them to leave. *T. 375.* In addition to contradicting Elder, Ledbetter's testimony contradicts Security Officer Randolph's testimony that, although he instructed Kastens to remove his vehicle from Spirit's parking lot, the District 70 officers had the right to remain. *T. 475-476, 478-479.*

that the union will not represent him if he files a grievance. See *Steel Workers Local 1397*, 240 NLRB at 849; *Teamsters Local 886*, 229 NLRB 832, 832-833 (1977).

Viewed objectively, Johnson's statements clearly sought to coerce and intimidate Kastens because of his support for Cronk. Until Johnson and the other District 70 representatives arrived at Spirit's entrance gate, Kastens was merely engaged in peaceful campaign activity on behalf of a rival candidate.[11] It does not matter whether Kastens honestly feared a physical altercation with Johnson; Johnson's threats were objectively coercive and clearly intended to interfere with Kastens' campaign activity.

Furthermore, Johnson clearly made the threatening remarks in his capacity as Respondent's agent. The Board broadly construes agency principles and will find that individuals are union agents when they have authority to discuss employee complaints with management, write and resolve grievances, and generally serve as the union's liaison to employees and the employer. See *Electrical Workers Local 357 (Newtron Heat Trace, Inc.)*, 343 NLRB 1486, 1498 (2004). As an in-plant representative, Johnson had authority to resolve grievances, and, in fact, testified that he previously resolved at least one grievance on Kastens' behalf. *T. 288-289, 299-302, 310.* Even though Johnson was promoted in March 2014, he remained in District 70's employ as an organizer and liaison, working directly for Directing Business Representative Molina. *T. 98, 288.* It is also worth noting that Johnson arrived at Spirit's property along with Assistant Business Representative Ledbetter and nearly every other District 70 representative. Thus, even assuming that Johnson was not acting within the scope of his authority when he threatened Kastens, the circumstances clearly demonstrate that Kastens

[11] Contrary to Respondent's suggestion, dissident union activities are protected conduct. See, e.g., *SPFPA Local 444*, 360 NLRB No. 57, slip op. at 6. Furthermore, there is no credible evidence that Kastens' activities became unprotected either because he provoked Johnson or, assuming that Respondent has a genuine interest in guarding Spirit's property, because he parked his car in Spirit's parking lot or otherwise ventured onto Spirit's property.

had every reason to believe that Johnson was speaking for Respondent. See *Electrical Workers Local 45*, 345 NLRB 7, 7 (2005) (explaining that apparent authority is established when representatives are "cloaked [ ] with sufficient authority to create a perception among the rank-and-file that [they act] on behalf of the union"); see also *Teamsters Local 886*, 229 NLRB at 833.

For the forgoing reasons, the record clearly demonstrates that Johnson violated Section 8(b)(1)(A) through his threat of physical violence and by threatening to ensure Kastens' continued unemployment because of Kastens' dissident union activity.

C. Respondent Attempted to Cause and Caused Kastens' and Lehman's Discharge

1. Legal Framework

A union violates Section 8(a)(2), and derivatively violates Section 8(b)(1)(A), when it attempts to cause an employer to discipline bargaining unit employees because of their dissident union activities. See *Security Police and Fire Professional of America (SPFPA) Local 444*, 360 NLRB No. 57, slip op. at 6 (February 28, 2014). As the Board recently observed, it has been somewhat inconsistent in expressing the appropriate analytical framework in such cases, applying a duty-of-fair-representation framework in some, and the burden-shifting analysis from *Wright Line*[12] in others. See *Good Samaritan Medical Center*, 361 NLRB No. 145, slip op. at 2 (December 16, 2014).

Under the duty of fair representation analysis, the Board applies a rebuttable presumption that a union violates the Act by causing the discharge of a bargaining unit employee, and permits the union to rebut the presumption by demonstrating that it acted in accordance with a valid union security clause or in a manner that was necessary to effectuate the performance of its

[12] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983).

function of representing its constituency. See *Acklin Stamping Co.*, 351 NLRB 1263, 1263 (2007), citing, inter alia, *Graphic Communications Workers Local 1-M (Bang Printing)*, 337 NLRB 662, 673 (2002). See also *Operating Engineers Local 18*, 204 NLRB 681, 681 (1973) enf. denied on other grounds 496 F.2d 1308 (6th Cir. 1974). Under the *Wright Line* analysis, the General Counsel must first prove, by a preponderance of the evidence, that the employees' protected conduct was a motivating factor in the union's adverse action by demonstrating that the employees engaged in protected activity, the union had knowledge of that activity, and the union possessed animus against the employees' protected conduct. A union may rebut the General Counsel's showing by demonstrating that it would have taken the same action absent the employees' protected activity.

2. Kastens' and Lehman's Dissident Activities Motivated Respondent's Actions

Regardless of which framework one uses to analyze Respondent's actions, the evidence clearly establishes that Respondent retaliated against Kastens' and Lehman because of their protected activity. Respondent did not dispute having knowledge of Kastens' and Lehman's dissident conduct, and Respondent -- particularly Howard Johnson -- clearly exhibited animosity toward Kastens' and Lehman's activity. Thus, it is appropriate to consider whether Respondent had a nondiscriminatory reason for its actions.

Respondent's witnesses contended that Howard Johnson acted in good faith when he informed Spirit about the video attached to Lehman's and Kastens' e-mails. It appears that Respondent's argument is twofold: (1) Johnson's actions were necessary to represent the bargaining unit; and (2) Johnson did not actually intend to cause Spirit to discharge Kastens and Lehman or even know that he was reporting them to Spirit because he did not actually look to

see who initiated the e-mail chain. Contrary to Respondent's arguments, the record establishes that Respondent's representatives clearly intended to initiate disciplinary action against Kastens and Lehman because of their dissident activity. Accordingly, under either analytical framework Respondent has not carried its burden.

3. Respondent's Actions Were Not Necessary to Represent the Bargaining Unit

According to Howard Johnson and Becky Ledbetter, they were not even aware of the automobile accident captured in the video forwarded by Kastens and Lehman (Jt. 20) until they received Kastens' e-mail on January 27. *T. 290-291, 323-324, 337-338.* Although Johnson and Ledbetter contend that Johnson ultimately forwarded Lehman's and Kastens' e-mails to Spirit because they were getting so many calls about it from bargaining unit employees, *T. 291-292, 336-338*, the record overwhelmingly demonstrates that their testimony should not be taken at face value.

Despite testifying that he received multiple calls about the video's release, Johnson was unable to specifically recall any conversation with a bargaining unit employee, and he did not provide any records to show that anyone other than Ledbetter contacted him. *T. 291-292.* For her part, Ledbetter was able to name only a single bargaining unit employee, Reginald Maloney, who contacted her. *T. 336-337.* Although Maloney acknowledged that he contacted Ledbetter because he was surprised to see the video circulating by e-mail, *T. 388*, his testimony otherwise contradicts Respondent's assertion that Johnson sent the video to Spirit as a means of representing Respondent's constituency.

Maloney was unsure about the date he first saw the video and could not recall when he contacted Ledbetter. *T. 395, 397.* Even assuming that Maloney immediately contacted Ledbetter

once he saw the video, the record fails to support Ledbetter's assertion that Maloney contacted her late in the evening on January 27 before she forwarded Lehman's and Kastens' e-mails to Johnson. *T. 336.* Neither Lehman nor Kastens sent the video to Maloney or Terry Flynn, the employee who first showed Maloney the video. *T. 376, 395-396; R 12; GC 24.* Although Maloney could not pinpoint the date on which he first saw the video, he recalled first viewing the video at work between the hours of 7:00 a.m. and 4:00 p.m. *T. 386-387, 395-397.* Kastens, however, did not send the e-mail to Ledbetter until 7:17 P.M. on January 27, and, Ledbetter sent the e-mail to Johnson only two hours later. *R 12; GC 24.* Thus, Maloney either saw the video sometime after January 27, or viewed a copy of the video that was disseminated by someone other than Kastens. Either way, the evidence does not support Respondent's assertion that Johnson sent Kastens' and Lehman's e-mails to Respondent in response to bargaining unit employees' inquiries.

Even if one assumes-- contrary to record evidence -- that Ledbetter and Johnson actually received a call about the video between 7:17 p.m., when Kastens transmitted the video to Ledbetter, and 9:18 p.m., when Ledbetter sent the e-mail to Johnson, there is no evidence that they had a representational basis for sending Lehman's and Kastens' e-mails to Spirit. Respondent's witnesses did not articulate a single reason to explain how Johnson's actions served the bargaining unit. There is no evidence that Roger White, the driver of the scooter involved in the accident, complained about the video. In fact, as noted above, none of Respondent's witnesses even knew that White had been involved in an accident until sometime after they viewed the video.[13] *T. 290-291, 323, 395.* Maloney, the sole bargaining unit employee who acknowledged contacting one of Respondent's representatives, testified that he could not

[13] One could not reasonably claim to have been able to have identified that White was driving the scooter based on reviewing the video alone. *Jt. 20.*

recall any particular reason why the video concerned him, explaining only that he contacted Ledbetter because he thought that it was strange that the video was circulating by e-mail. *T. 389, 393*. Despite Respondent's attempt to elicit testimony that Maloney contacted Ledbetter because of his own checkered driving history, his testimony simply does not support this assertion. *T. 391-392.* Furthermore, although Ledbetter and Johnson claimed that numerous employees called them to report the video, there is no evidence concerning the phantom calls and no evidence of a legitimate explanation for Johnson's inspiration to forward Kastens' and Lehman's e-mails to Spirit. Accordingly, Respondent's evidence fails to demonstrate that Respondent sent Kastens' and Lehman' e-mails to Spirit to represent bargaining unit employees.

4. Respondent's Discriminatory Motive is Established by Its Multiple Attempts to Initiate Investigations Against Lehman and Kastens

In concluding that Respondent discriminatorily caused Kastens' and Lehman's discharge, one is not necessarily required to rely simply on Respondent's failure to articulate a reason for Johnson's decision to send Kastens' and Lehman's e-mails to Spirit. Rather, the record clearly demonstrates that Johnson's decision to send Spirit a copy of Kastens' and Lehman's e-mail was but one instance in a pattern of activity by Respondent's representatives to attempt to get Spirit to investigate and discipline Lehman and Kastens. Considered in context with Respondent's other actions involving Kastens and Lehman, it is clear that Johnson did not send their e-mails to Spirit for any legitimate purpose.

On January 13, Ledbetter e-mailed Spirit's Labor Relations Manager Jeff Clark and inexplicably asked him to have Spirit's IT Department retrieve Kastens' e-mail keystrokes.[14] *T. 378-380; GC 23*. Thereafter, on or about February 14, District 70's Secretary-Treasurer Lynne

[14] Notably, before being shown a copy of her e-mail, Ledbetter at first denied ever asking Spirit to investigate Kastens' actions. *T. 378.*

Strickland sent a series of Kastens' and Lehman's Facebook posts to Directing Business Representative Molina, writing, "This is from my phone. The paper I gave you today has the date and time on it. He posted this new post tonight." *GC 14, T. 70-71.* On February 14, Molina then sent the Facebook posts to Spirit's Labor Relations Manager Clark. Although Molina contended that he actually received the Facebook posts from Spirit, not vice versa, *T. 63, 68-69,* documentary evidence clearly demonstrates otherwise. In fact, Clark's response to Molina's February 14 e-mail erases any doubt that Respondent sent Spirit Lehman's and Kastens' Facebook messages:

> Frank, When I got these ***I shredded the hard copies you gave me last Friday*** because I thought this was more of the same but better larger quality so that I could print pictures. No [sic] of these images include the selfie from the shop. Can someone send me an electronic version of that? ***By the way I've blocked out the to and from and labeled the prints as from a reliable source.***"[15] *GC 14; T. 70-71.*

The extent of Respondent's active involvement in Spirit's investigation of Kastens and Lehman is further evident in Clark's February 24 e-mail, which reminded Molina to send Spirit a copy of the "selfie" (GC 11) that was eventually cited as a reason for Lehman's discharge. *GC 14.* Notably, although Molina testified that he did not have sufficient technical savvy to obtain Lehman's photograph independently, he did not deny that he gave Spirit a copy of the photograph after receiving it from someone else in his office.[16] *T. 63, 72.*

There is simply no rational explanation for Respondent's intimate role in Spirit's investigations of Kastens and Lehman, and Respondent offered no credible explanation for its representative's actions. Given Kastens' and Lehman's history of dissident activity, the inference is obvious.

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[15] Spirit's security report indicates that the Facebook posts were sent to Spirit "by a person wishing to remain anonymous." *GC 13.*

[16] Molina could not offer any explanation when asked why Clark asked him to obtain a copy of Lehman's photograph. *T. 73.*

Furthermore, considering Howard Johnson's undisputed history with Kastens and Lehman, his professed lack of animosity toward them is particularly absurd. *T. 309.* Although Johnson testified that he did not know that Kastens and Lehman were responsible for disseminating the video, it is impossible to take his testimony at face value and conclude that he is simply a grossly negligent representative who did not consider the video's source or comprehend that his actions might cause trouble for the individuals who sent the e-mail to Ledbetter. *T. 292-293.* As already previously discussed, Johnson was simply an unbelievable witness. For example, when asked *whether* he knew that Lehman and Kastens were responsible for disseminating the video, Johnson equivocated as follows:

> You know, I don't know the cause of that. I don't remember that. I mean I really don't. I mean I was more concerned of it being out, you know, that anything because, you know, after that happened I had a lot of maintenance guys call me. And everybody has called me and asked of me what's this doing out? *T. 292.*

When asked how long he knew Kastens, Johnson took the opportunity to impugn Kastens by claiming that he "saved his job a couple of times" even though he later admitted that he did not even handle so much as suspension grievances. *T. 299, 311.* It is certainly no coincidence that Johnson sent a copy of the video that was disseminated by Kastens, a known supporter of the reform candidates, and Lehman, Johnson's own former political opponent.

It is likewise impossible to credit Ledbetter's claim that she had no intention of causing Spirit to investigate Kastens' and Lehman's conduct and instead only wanted Johnson to help her get the video off the floor. *T. 343.* Like Johnson, Ledbetter clearly made no effort to constrain her testimony to actual facts. When asked if she ever asked Spirit to investigate Kastens' actions,

Ledbetter denied the fact despite clear evidence that she had done just that only a month before Spirit suspended Kastens and Lehman.[17] *T. 378; GC 23.*

The record clearly demonstrates that Respondent's representatives sought to initiate disciplinary action against Kastens and Lehman because of their dissident conduct. The timing of Johnson's e-mail -- almost immediately after receipt and before there is any evidence of an employee complaint – along with Respondent's other attempts to initiate investigations against Kastens and Lehman demonstrate Respondent's hostility toward their activities. Considering Respondent's asserted justification is a pretext, its failure to advance a legitimate, non-discriminatory basis for Johnson's actions supports the inference that Respondent's representatives were discriminatorily motivated. See, e.g., *Huck Store Fixture Co.*, 324 NLRB 119, 120-121 (2001) (inferring unlawful motivation based on a respondent's unsupported defense).

5. Respondent Caused Lehman's and Kastens' Discharge

Although neither Johnson nor Ledbetter specifically asked Spirit to discharge Kastens or Lehman, it is unnecessary to find an actual request to conclude that Respondent's actions violated Section 8(b)(1)(A) and (2). Evidence of an express demand is unnecessary to support a violation of Section 8(b)(1)(A) and (2) where the evidence otherwise supports a reasonable inference that Respondent sought to initiate discipline. See *Service Employees Local 87 (Able Building Maintenance Company*, 349 NLRB 408, 411-412 (2007). The Board has found violations of Section 8(b)(1)(A) and (2) in cases in which union agents reported employees' conduct to employers in situations in which disciplinary action was simply reasonably likely to

[17] When Lehman spoke with Ledbetter while filing his grievance, she falsely told him that she did not know why he had been suspended. *T. 240-214.*

ensue. See, e.g., *Town and Country Supermarkets*, 340 NLRB 1410, 1411-12 (2004) (concluding that the union reported a threat of physical harm by an employee based on his dissident activity); *Bang Printing*, 337 NLRB at 662, 664 (causing discharge by reporting unsubstantiated sexual harassment allegation because of dissident activity).

Even assuming that Respondent's representatives were not certain that discipline was likely to ensue when they decided to send Kastens' and Lehman's e-mail to Spirit, it is vital to remember that their actions were not confined to this single instance of reporting Kastens' and Lehman's actions to Spirit. As previously addressed, Johnson's e-mail was preceded by Ledbetter's January 13 request that Spirit audit Kastens' e-mails and followed by Molina providing Spirit the employees' Facebook posts and Lehman's in-plant photograph. Under the circumstances, there is simply no way to conclude that Respondent's representatives did not intend for Spirit to discipline Kastens and Lehman. Instead, the record clearly shows that Respondent's representatives were actively engaged in a campaign to give Spirit the ammunition to discipline Kastens and Lehman, and they eventually succeeded in their efforts.

Rather than seeking to represent Kastens and Lehman, Respondent's representatives clearly abdicated their fiduciary responsibility and instead focused on assisting Spirit in obtaining evidence to support disciplinary actions against them. The record clearly demonstrates that Respondent's representatives willingly used Spirit's labor relations department as a means of retaliating against dissident members. Accordingly, the evidence clearly demonstrates that Respondent sought to cause and caused Spirit to take disciplinary action against Kastens and Lehman and thereby violated Section 8(b)(1)(A) and 8(b)(2).[18]

[18] Although Johnson sent Kastens' and Lehman's e-mails to Spirit more than six months before Kastens' filed the first amended charge in this matter, the record clearly indicates that Kastens did not know, and had no reason to

D. Respondent Failed to Fairly Represent Kastens

1. Legal Framework

Pursuant to Section 8(b)(1)(A), a union has a duty to represent all bargaining unit members "without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Although a union enjoys considerable discretion in processing grievances, it violates Section 8(b)(1)(A) when it acts to the detriment of a member or members of the bargaining unit for reasons that are arbitrary, discriminatory, or in bad faith. *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 75-78 (1991); *Teamsters Local 101 (Allied Signal)*, 308 NLRB 140, 144 (1992); *Auto Workers Local 909 (General Motors Corp.-Powertrain)*, 325 NLRB 859, 865 (1998).

Even without evidence of a hostile motive, the Board will find a violation of Section 8(b)(1)(A) if a union processes a grievance in a perfunctory or arbitrary manner. See *Union of Sec. Personnel of Hospitals*, 267 NLRB 974, 980 (1983). The Board considers a union's actions to be arbitrary if they are "so far outside a wide range of reasonableness as to be irrational"[19] or found to demonstrate "something more" than mere negligence.[20] As the Board has noted, the "something more than negligence" standard is not susceptible to precise definition but must be analyzed by the particular facts of each case. *Office Employees Local 2*, 268 NLRB 1353, 1355 (1984). Although it is well settled that "an employee is subject to the union's discretionary power to settle or even abandon a grievance," the union must exercise its discretion in good faith.

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know, about his action until the time he filed the amended charge. *T. 199; GC 1-F.* These circumstances warrant tolling the 10(b) period. *See Oregon Steel Mills*, 291 NLRB 185, 192 (1988) ("Section 10(b) does not bar any allegation that was not within the knowledge of or which could not have been discovered by the charging parties with reasonable diligence.").

[19] *Steel Workers (Cequent Towing Products)*, 357 NLRB No. 48, slip op. at 2 (2011) , quoting *Airline Pilots v. O'Neill*, 499 U.S. at 67 (1991).

[20] See *Truck Drivers Local 692*, 209 NLRB 446, 447-448 (1974).

Teamsters Local 528 (Walsh Construction), 272 NLRB 28, 28 (1984), citing *Vaca v. Sipes*, 386 U.S. at 190. Finally, regardless of the apparent merits of a grievance, the Board will find that a union violates Section 8(b)(1)(A) if it abandons a grievance for invidious reasons. See *Bottle Blowers Local No. 106*, 240 NLRB 324, 324-326 (1979).

Considering Respondent's active involvement in causing Kastens' discharge, the manner in which it processed his grievance warrants heightened scrutiny. This is not a case in which Respondent simply made a reasoned decision that it would not arbitrate Kastens' discharge. Rather, the evidence overwhelmingly demonstrates that Respondent actively stacked the deck against Kastens (and, for that matter, Lehman) and then processed Kastens' grievance in a manner that was intended to mask its unlawful motive and actions.

As Respondent's ultimate decision maker, Directing Business Representative Frank Molina's credibility is clearly in issue, and the totality of his testimony demonstrates that he simply cannot be taken at his word concerning the manner in which he processed Kastens' grievances. Although Molina cited a personal friendship with Kastens and Lehman as the reason he assumed the responsibility for processing their discharge grievances, *T. 36, 87-88*, the record tells an entirely different story. As described below, Respondent's entire defense rests on a foundation of mischaracterizations of Kastens' disciplinary history and a nonexistent investigation into his discharge.

2. Molina's Processing of Kastens' Suspension Grievances Demonstrates Respondent's Bad Faith

Molina and Respondent suggest that Kastens' discipline history severely limited Respondent's ability to do anything other than concede his discharge. This simply is not true. Although Kastens' February 14 suspension was not his first offense, the evidence does not

support Molina's assertion that Kastens' discharge was a fait accompli because of his work record.

Kastens received verbal and written warnings for parking violations in March and May 2013, *Jt. 10, pp. 4-5*, and, because he did not grieve these disciplinary actions, when he failed to report his absence from work on November 4, 2013, Spirit issued him a three-day suspension on November 8, 2013. *Jt. 10, p. 3*. Thereafter, in late December 2013, Kastens was again suspended when Spirit's managers accused him of misusing company time and misrepresenting himself as a union steward. *Jt. 10, p. 4*.

Although Spirit certainly considered Kastens' previous suspensions in deciding to discharge him in March, Respondent completely ignores the fact that Kastens had unresolved grievances concerning both suspensions when Spirit discharged him. As demonstrated below, the record establishes that, even though Kastens' November 2013 suspension was once all but removed from his record, and his December 2013 suspension remained dispute and subject to an open grievance, Molina never even attempted to investigate or resolve these issues before abandoning Kastens' grievances.

a. Facts Concerning Kastens' Other Active Grievances

In late October 2013, Kastens attended a week-long union training class in Maryland. *T. 129*. Although the class ended on November 1, Kastens arranged to stay the weekend and return to Wichita on November 4, 2013, as he had on two previous occasions without incident. *T. 129-132*. On this occasion, however, Kastens, who had been working in Seattle instead of Wichita the week before his trip, neglected to inform his managers that he intended to be absent on November 4. *T. 129-130*. Although Kastens mistakenly assumed that his absence would be

excused because he was attending a union function, his managers concluded that he was absent without leave and suspended him. *T. 132; Jt. 2.*

Kastens filed a grievance on November 8, 2013, claiming that his suspension was unjust and requesting that it be removed from his record or reduced to a written verbal warning, explaining, in pertinent part:

> I was written up in May for parking, today I was written up and suspended for not informing management that I would be gone on Monday. (Two separate issues and my first offense-unjust)[.] I failed to notify management of my absence due to being in Seattle prior to my organizing 2 class. I scheduled my return flight for Monday weeks in advance as I have done on 2 previous occasions (past practice). I was also under the impression my day off was excused for union business. *Jt. 3, pp. 4-5; T. 130-131.*

Kastens gave his grievance to Local 839 In-Plant Representative Tim Johnson and explained that, although he neglected to inform management that he would be gone, he had requested later return flights on other occasions following his attendance at out-of-town classes without incident. *T. 131.* Johnson informed Kastens that he would address the matter. *T. 131.*

Thereafter, Kastens served only a one day suspension, returning to work after a Spirit representative called him and told him that he had been in communication with Kastens' Union. *T. 132, 543.* Several weeks later, Kastens spoke with Johnson and District 70 Business Representative Greg Treadwell, and Treadwell informed him that his grievance was all but resolved, explaining that, once Respondent received Spirit's signature on the agreement, his suspension would be removed from his record, and he would receive backpay for the day that he missed. *T. 134.*

On December 23, 2013, however, Spirit again suspended Kastens, claiming that he misused work time and misrepresented himself as a steward. *T. 139-141.* The incident leading to

Kastens' suspension occurred on December 19, 2013,[21] when, on his way out of work after finishing his shift, Kastens spoke with fellow employee Shane Harper because he heard that Harper and another employee, Angel Santana, had been in a physical confrontation the previous night. After speaking with Harper, Kastens drove to Spirit's HR facility to report that he had witnessed prior verbal confrontations between Harper and Santana that had not been addressed by management. *T. 137-138.* The following day, Kastens met with Spirit's security officers to explain what he knew about the situation. *T. 138.*

Kastens filed a grievance concerning his suspension on January 2. *Jt. 5; T. 140-141.* Kastens gave the grievance to Tim Johnson and explained that he did not represent himself as a steward or misuse company time but simply spoke to Shane Harper and then went to human resources after work to volunteer his testimony. *T. 141; GC 6.*

On January 6, Kastens returned to work and received written notification of his suspension for "misus[ing] company time and misrepresent[ing] yourself as a union steward in investigating an issue in the shop area when in fact you are not a union steward or union official." *Jt. 4; T. 135-136.* Although Kastens signed the disciplinary form, he utilized the "employee comments" section to explain why he felt that the discipline was unwarranted. *Id.*

Several weeks after returning to work, Kastens spoke with Johnson at the Local 839 office about the status of his grievances, and Johnson told Kastens that the Employer no longer seemed inclined to resolve his November 2013 grievance because of his December 2013

[21] Kastens testified that the incident occurred the Thursday before Christmas, which, in 2013, was December 19. *T. 137.*

suspension. Thereafter, about February 6,[22] Johnson transferred Kastens' grievances to District 70 for further processing. *T. 142-143; Jt. 3, p. 6; Jt. 5, p. 3.*

b. Molina's Misleading Testimony Concerning Kastens' Prior Discipline

The evidence ultimately fails to demonstrate that Molina did anything to process Kastens' suspension grievances. Although Molina's testimony suggested that he reviewed Tim Johnson's notes concerning Kastens' prior suspensions, and, satisfied with Johnson's efforts, found no basis for independently investigating the matters, *T. 561-562*, the evidence does not support his testimony. Although Tim Johnson initially processed Kastens' November 2013 grievance (Jt. 3) and his January 2014 grievance (Jt. 5), he submitted those grievances to District 70's office on February 6 after Spirit declined to resolve them. *T. 30-33, 142-143; Jt. 3, p. 6.; Jt. 5, p. 3.* Notably, Johnson's notes clearly reflect that Spirit did not provide any information during his investigation. *Jt. 3, p. 6; Jt. 5, 3.* Despite this fact, there is no evidence that Molina ever even attempted to follow up with Kastens or Spirit concerning the unresolved grievances, and Molina also failed to offer any explanation why he decided to abandon the grievances.

Instead of addressing why he decided to abandon Kastens' November 2013 grievance even though Spirit had once been close to settling it in Kastens' favor, Molina attempted to falsely characterize Kastens' unexcused absence in far more nefarious terms, testifying that Spirit Manager Robbin Ketterman suspended Kastens because Kastens attempted to get Molina and Becky Ledbetter to falsify documents so that his absence would be excused *T. 92, 103-104, 122.* Not only was Molina's testimony contradicted by Ketterman, who simply testified that she suspended Kastens because he did not have approved leave, *T. 466*, but it also was not

[22] The letters are misdated and indicate that they were sent in 2013 rather than 2014. *T. 142.*

corroborated by Assistant Directing Business Representative Ledbetter, who was more intimately involved in Kastens' leave request. Ledbetter simply testified that she was unable to excuse Kastens from work on November 4 because he was no longer on official business. *T. 349-351.* Molina's claim that Kastens' tried to falsify documents is also squarely at odds with Respondent's own business records. Respondent's e-mail records demonstrate that as early as May 2013, Kastens notified Respondent's representatives that he intended to remain in Maryland the weekend following his October 2013 training class. After being advised that he did not need to make any arrangements until he scheduled his flights, Kastens registered for the class. *R. 8, pp. 7-8.* Then, once Kastens returned from the trip and his November 4 absence became an issue, he simply sought further clarification concerning whether his absence would be excused by Respondent, whether he needed to request leave, or whether he should simply accept the disciplinary consequences of his absence from work. *R. 8, pp. 12-14.*

Although Kastens may have been guilty of misunderstanding Spirit's leave policies, the evidence certainly does not corroborate Molina's assertion that Kastens attempted to get Respondent's representatives to falsify documents. Molina's willingness to mischaracterize the basis for Kastens' November 2013 suspension not only raises significant doubts about his credibility, but it also demonstrates his total lack of familiarity with Kastens' grievance file.[23] In fact, Molina's ignorance of Kastens' disciplinary history is highlighted by his testimony that he spoke with Robbin Ketterman in December 2013 and convinced her not to discharge Kastens because of his unreported absence. *T. 92, 122.* Kastens, of course, was suspended for the incident in early November 2013 and had already been reinstated at the time Molina purportedly saved his job.

[23] Another example of Molina's false testimony concerning Kastens' discipline history is found in his claim that Kastens was disciplined multiple times in January. *T. 566.*

Like his testimony concerning Kastens' November 2013 suspension, Molina's testimony concerning Kastens' December 2013 suspension demonstrates his duplicity. Respondent contends that, as a result of his December 2013 suspension, Kastens independently agreed to a last chance agreement, thereby undermining Molina's ability to resolve his discharge. *T. 74, 85, 91; Jt. 4.* Although Kastens' *disciplinary action form* provides, "If you receive any type of discipline in the next 12 months, you will be terminated for generally unacceptable misconduct," it was not a last chance agreement. *T. 74, 85, 91; Jt. 4.* Spirit's disciplinary action form instructions expressly provide, "[t]he employee's signature on the disciplinary memo merely indicates review and receipt, not necessarily agreement." *Jt. 4, p. 2.* In fact, as Kastens' former manager Robbin Ketterman explained, Spirit's managers include similar "last chance" language on nearly all disciplinary actions. *T. 465.* Further dispelling the notion that Kastens signed a last chance agreement, when Kastens signed the January 6 suspension notice, he added the following comments:

> I wasn't representing myself as a steward, I had information that I felt security needed to know is all. Also, when I spoke with Shane Harper I simply asked him how he was doing because the day before he was really angry. I did this as I was leaving the building, therefore it wasn't done on company time! *Jt. 4, p. 1; T. 135.*

Molina clearly knows the difference between a disciplinary form and a last chance agreement. *T. 123-124; GC 18; GC 19.* Yet, Molina repeatedly testified about the impact of Kastens' "last chance agreement" and claimed to have exhaustively researched arbitration decisions concerning that issue prior to determining to abandon Kastens' grievance. *T. 97, 114-115; R. 11.* In fact, Molina even cited Kastens' "last chance agreement" when informing Kastens of Respondent's decision to abandon his grievance. *T. 74, 85, 91, 97, 114-115.*

The evidence clearly establishes that Molina had no desire to actually represent Kastens. Instead of actually reviewing Kastens' open grievances, Molina simply chose to ignore them and instead mischaracterize Kastens' disciplinary history to support his refusal to contest Kastens' discharge. As a result of Molina's actions, Kastens' November 2013 grievance was never finally settled and Kastens' January grievance Molina's actions fall well short of his statutory responsibilities. See, e.g., *Service Employees Local 579 (Beverly Manor)*, 229 NLRB 692, 695 (1977) (finding union handled grievance in a perfunctory manner by failing to question the reason for an employee's discharge).

3. Molina's Processing of Kastens' Discharge Grievance Further Demonstrates Respondent's Bad Faith

The manner in which Molina investigated Kastens' discharge further demonstrates his complete lack of good faith. Although Molina submitted a request for information to Spirit on February 27, *T. 37, 40-42, 548-551; GC 7; GC 9*, his subsequent actions were nominal and appear to have been merely aimed at presenting the appearance of an honest investigation. In fact, upon reviewing Molina's testimony about his investigation, it becomes clear that he had no intention of actually representing Kastens.

First, it bears noting that, in many instances, it is nearly impossible to decipher Molina's testimony concerning what his investigation actually involved. At various times, Molina was either unable or unwilling to recall which documents were included in Kastens' grievance file or when he first reviewed the documents. *T. 33-35, 46-57, 65-66, 559-560.* In other instances, Molina's testimony was either contradictory or objectively untrue, involving recollections of events that clearly did not happen. For example, Molina initially testified that as soon as Kastens

and Lehman filed grievances concerning their suspensions, he contacted Howard Johnson[24] and instructed Johnson that he intended to handle their grievances. *T. 87.* In later testimony, however, Molina completely changed his story and claimed that he did not begin processing Kastens' grievance until after Kastens' discharge because Tim Johnson conducted the initial investigation.[25] *T. 546-547, 565-567.*

Second, contrary to Molina's claim that he actively exchanged information with Kastens about his grievance because he sought "to make sure I wasn't missing something, if there was something else out there," *T. 548, 553*, the record demonstrates that Molina made little effort to communicate with Kastens about the facts of his case. In fact, aside from contacting Kastens in mid February and generically informing him that his suspension involved an e-mail, there is no reliable evidence that Molina ever had any substantive communications with Kastens about his grievances. Although Molina claimed to have "a lot of notes" describing his interviews with Kastens, *T. 559-560*, Respondent did not introduce a single document to support his testimony. Kastens denied that Molina ever interviewed him about his suspension and discharge, *T. 153, 199-200, 572*, and Kastens' records demonstrate that when he sent several text messages to Molina concerning his grievance, Molina either provided a cursory response or did not respond at all. *GC 3; T. 151-152.* Most compelling, on March 8 Molina e-mailed his staff to inform them that Kastens would be bringing a copy of his termination paperwork, and included the instruction: "absolutely no other paperwork from his file is to be released to him irregardless

[24] Johnson denied having such a conversation with Molina. *T. 299.*

[25] The date of Molina's information request obviously contradicts his testimony that he did not begin handling Kastens' grievance until after he was discharged on March 5. Furthermore, despite Molina's claim that Johnson initially handled Kastens' discharge grievance, *T. 546-547, 561-562, 565-567*, the evidence does not support this assertion. Johnson did not attend Kastens interview with Spirit's security department on February 25, and there is no evidence that Johnson even spoke with Kastens about his discharge, as Kastens testified. *T. 572-573.* Respondent, of course, provided no documents that contradict Kastens' testimony.

[sic] of what he says none of his paperwork is to be released to him from me or from the district.... Without my approval!" *GC 10; T. 43-44.* Molina was clearly more concerned with shielding information from Kastens than with obtaining information that might exculpate him.

Third, although Molina testified that he honestly attempted to evaluate Kastens' grievances, the record simply does not support his testimony. As previously addressed, Molina clearly appeared to know very little about the circumstances of Kastens' November and December 2013 suspensions. Furthermore, Molina could not answer many fundamental questions about the incident that led to Kastens' discharge. For example, Molina testified that he could not get "any solid answers" how Spirit's confidential video found its way to Lehman and Kastens. *T. 59.* Similarly, Molina did not know whether any other employees had been disciplined as a result of the video's dissemination. *T. 59-60.*

The credibility of Molina's investigation is also severely undermined by his claim that he had no knowledge that Howard Johnson was responsible for sending Kastens' e-mail to Spirit until sometime after he settled Kastens' grievance. *T. 48-56, 83; GC 17.* Considering Molina's intimate involvement in transmitting other evidence against Kastens and Lehman to Spirit,[26] his professed lack of knowledge concerning the manner in which Spirit obtained Kastens' e-mail is simply unbelievable. As Spirit Senior Security Manager Jason Neal testified, Spirit does not maintain redacted copies of its security reports, *T. 273-275*, and it defies reason, as Molina apparently claims, that Spirit sent Molina a security report that included every page but the one page that showed that Johnson transmitted Kastens' e-mail to Spirit. *GC 17.* One cannot imagine a single reason to explain why Spirit's managers would feel it necessary to protect Johnson's

[26] Not only did Molina take an active role in sending Spirit Kastens' and Lehman's Facebook posts, *GC 14*, but Ledbetter also copied him on her January 13 e-mail requesting access to Kastens' email activity. *GC 23.*

identity from Molina or Respondent's other officers. Even had Spirit done so, it is simply unimaginable that Molina would not have investigated the issue unless he already knew the answer.[27]

Fourth, although Molina sought Attorney Tom Hammond's counsel concerning the disposition of Kastens' (and Lehman's) discharge grievance, the record clearly indicates that he was not interested in an honest evaluation of the merits of Kastens' case. Despite falsely testifying that he submitted Kastens' *entire* grievance file to Hammond, *T. 87*, Molina actually neglected to send Hammond copies of Kastens' November 2013 and January 2014 grievances. *T. 499-503.* As a result, Hammond incorrectly assumed that Kastens' November and December 2013 suspensions were not subject to active grievances, and he mistakenly concluded that Kastens' unchallenged discipline precluded Respondent from challenging his subsequent discharge. *T. 487-488, 495-496; R 6.* Thus, although Hammond testified that he considered it unlikely that Respondent could prevail in arbitration because Kastens' most-recent discipline (Jt. 4), his analysis was based only on those documents that Respondent elected to share with him. *T. 495.* Clearly, Respondent cannot utilize Hammond's advice as an endorsement of its decision to abandon Kastens' grievances when it withheld information from him that would have altered his analysis.

Finally, the evidence concerning the way in which Molina negotiated Kastens' settlement demonstrates his utter lack of good faith. Notwithstanding Molina's claim that he met with Vice President of Labor Relations Justin Welner to attempt to resolve Kastens' grievance, credible evidence simply does not support his blatantly false testimony. Whereas Molina claimed that

[27] It bears repeating that when one compares GC 13 and GC 14, it appears that Spirit intentionally concealed the fact that Molina was the source of Kastens' and Lehman's Facebook posts.

Welner rejected his claim to reinstate Kastens because of Kastens' repeated poor conduct,[28] *T. 100-102*, Welner unequivocally testified that he did not have any involvement in Kastens' grievance and only had limited knowledge of why Kastens had even been discharged. *T. 512, 515*. Furthermore, even though Molina actually obtained a nominal settlement for Kastens, the record clearly demonstrates that he made no attempts to involve Kastens in the settlement process. Despite Molina's claims that he apprised Kastens of his decision not to seek arbitration before reaching a settlement agreement with Spirit, more reliable evidence contradicts his testimony.[29] In fact, although Spirit initially sought to seek Kastens' concurrence in the settlement, once Molina reviewed Spirit's proposal, Spirit agreed to remove the grievant release. *GC 15*.

Considering the numerous discrepancies in Molina's testimony, it is impossible to take it on faith, as Respondent asks, that Molina honestly processed Kastens' grievances. Time and time again Molina provided contradictory and unabashedly false testimony concerning Kastens' disciplinary history, his grievances, and Respondent's investigations. Considering the clear animus directed at Kastens' dissident union activities by Respondent's representatives (Molina included), the record certainly supports the inference that Molina was discriminatorily predisposed to abandon Kastens' grievances, thus denying him any opportunity of obtaining reinstatement from the discharge Respondent worked so hard to initiate.

Even assuming that one concludes that the record does not establish that Respondent abandoned Kastens' grievances because of his dissident activities, the substance of Molina's

[28] According to Molina's testimony, Welner knew Kastens' and Lehman's names even before Molina walked into his office to seek their reinstatement. *T. 101-102*.

[29] Even Molina's testimony was contradictory. He first claimed to have spoken with Kastens, and then changed his testimony and said he may have been unable to get in touch with Kastens for some reason and instead left a voicemail message. *T. 558*. As previously discussed, Kastens' text message records and Respondent's own e-mail records tell a different story. *GC 3; GC 10*.

testimony clearly demonstrates that he processed Kastens' grievances in a perfunctory manner. Although the Board does not require a union to investigate every complaint or deem the mere mismanagement of a grievance to be a violation of Section 8(b)(1)(A),[30] Molina's conscious disregard of the facts clearly demonstrates his complete lack of good faith. At its essence, Section 8(b)(1)(A) imposes the affirmative obligation that, when a union undertakes a grievance, its decision-making process must be fair and honest. See *General Truck Drivers Local 315 (Rhodes & Jamieson, Ltc.)*, 217 NLRB 616, 618-619 (1975). Under the circumstances, there can be no doubt that Respondent utterly failed to meet its obligations of representing Kastens fairly.

IV. CONCLUSION

For the forgoing reasons, the General Counsel respectfully submits that the evidence establishes Respondent's representatives violated Section 8(b)(1)(A) by threatening Ryan Kastens with bodily injury and by threatening to impede his efforts to obtain reinstatement; Respondent violated Section 8(b)(1)(A) and (2) by attempting to cause and caused Spirit to discharge Kastens and Jarrod Lehman; and Respondent violated Section 8(b)(1)(A) by discriminatorily and/or arbitrarily processing Kastens' outstanding grievances. As part of the remedy for Respondent causing Kastens' and Lehman's discharge, the General Counsel seeks an Order requiring that Respondent make Kastens and Lehman whole for the loss of earnings and other benefits they suffered as a result of their suspensions and discharges beginning on February 14, 2014, until such time as the employees are reinstated by Spirit or the employees obtain other substantially equivalent employment.

The General Counsel further requests, as part of the remedy for Respondent's failure to fairly process Kastens' grievances, and that Respondent be ordered to promptly request that

[30] *Diversified Contract Services*, 292 NLRB 603, 605-606 (1989).

Spirit reinstate Kastens to his former position or, if that position no longer exists, to a substantially equivalent position. If Spirit refuses to reinstate Kastens, the General Counsel seeks an Order requiring Respondent, among other things, to request that Spirit process the grievances over Kastens' suspensions and discharge and to pursue the grievances in good faith with due diligence, including permitting the Kastens to have counsel or another representative of his own choosing present at the grievance-arbitration proceedings at Respondent's expense. If it is no longer possible for Respondent to pursue Kastens' grievances and, if the General Counsel shows in a subsequent compliance proceeding that a timely-pursued grievance on those issues would have been successful, the General Counsel also requests that the Respondent be ordered to make Kastens whole for any loss of earnings and other benefits suffered as a result of his suspensions and discharge until such time as the Kastens is reinstated by Spirit or he obtains other substantially equivalent employment.

Dated: April 3, 2015

Respectfully submitted,

Michael E. Werner and
Julie Covel
Counsel for the General Counsel

STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing Counsel for the General Counsel's Brief to the Administrative Law Judge pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Division of Judges with service by electronic mail on the parties unless otherwise indicated.

Dated: April 3, 2015

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT 70 and LOCAL LODGE 839 (Spirit AeroSystems)

And **Case 14-CB-133028**

RYAN KASTENS, An Individual

And

SPIRIT AEROSYSTEMS, INC.

RESPONDENTS' EXCEPTIONS TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Board's Rules and Regulations, Respondents International Association of Machinists and Aerospace Workers, AFL-CIO, District 70 and Local Lodge 839 (referred to jointly as *Respondents* or *the Union*) file their Exceptions to the Decision and Order of Administrative Law Judge Michael A. Rosas, dated April 29, 2015 and amended May 5, 2015, as follows.

Exceptions

1. The Union excepts to the ALJ's determination that "[b]y attempting to cause and causing the Company to discharge Ryan Kastens and Jarrod Lehman on February 14, 2014, because of their dissident union activity and/or other protected concerted activities, the Union violated Section 8(b)(1)(A) and (2)." (ALJD 16:25-27; 14:31)

2. The Union excepts to the ALJ's determination that "[b]y threatening to cause bodily harm to Kastens on April 11, 2014, and impede his efforts to obtain reinstatement because

EXHIBIT B

he engaged in protected concerted activities, the Union, by Howard Johnson, violated Section 8(b)(1)(A)." (ALJD 16:29-31; 13:5-7)

3. The Union excepts to the ALJ's determination that "[b]y discriminatorily and/or arbitrarily processing Kastens' outstanding grievances against the Company, the Union violated Section 8(b)(1)(A)." (ALJD 16:33-34)

4. The Union excepts to the ALJ's statement that Local 839 assigned Howard Johnson as its second shift In-Plant Representative. (ALJD 2:32-33) Johnson was a former In-Plant Representative but he has held the title of Organizer since March 2014. (Tr. 288:3-17)

5. The Union excepts to the ALJ's finding that Steve Rooney, former District 70 President, did not discharge Jarrod Lehman as joint partnership advocate and that Frank Molina did not re-hire Lehman as joint partnership advocate. (ALJD 4:12-15, n.17) Molina's testimony established unequivocally that Lehman was fired by Rooney and that Howard Johnson assisted Lehman in reclaiming the position of joint partnership advocate. (Tr. 103:1-7, 124:17-25)

6. The Union excepts to the ALJ's failure to consider undisputed evidence of Charging Party Ryan Kastens's "attempts to elicit letters from Molina and Ledbetter falsely representing his time away on union-related work," which the ALJ acknowledged was "not denied" by the General Counsel or Kastens. (ALJD 4 n.21) This uncontroverted evidence shows that Kastens is deceitful and untrustworthy, and it reasonably suggests he may blame the Union's refusal to falsify its activity reports as a reason for one of the disciplinary actions imposed by the Company. (Tr. 103:13-111:20, 128:22-132:9, 348:10-352:5; Jt. Ex. 2, Resp. Ex. 8) This evidence adversely affects Kastens's credibility while his testimony is the principal source of evidence purportedly supporting the General Counsel's contentions. But the ALJ wholly disregarded such evidence of Kastens's efforts to induce the Union perpetrate a fraud against the employer.

7. The Union excepts to the ALJ's finding that "Kastens' relationship with District 70 leadership began to sour, however, in November 2013" despite his acknowledgment that District 70 President "Molina also came to Kastens' assistance after he received a disciplinary notice on December 6. In that case, Molina convinced Company Manager Robin Ketterman not to discharge Kastens for misconduct and convert it to a 3-day disciplinary suspension . . ." (ALJD 5:7-17) Molina's extensive efforts helped Kastens retain his job after November 2013 when the Charging Party's Supervisor had been determined to fire him. (Tr. 92:9-6, 95:6-10, 459:3-464:4; Jt. Ex. 4) Hence the ALJ's finding that the Union's leadership had a strained relationship with Kastens beginning in November 2013 is clearly erroneous by reason of such undisputed evidence.

8. The Union excepts to the ALJ's unsupported finding that in November 2013, Kastens "accompanied Karen Ascension, a vice presidential candidate in the upcoming IAM International election, to a union meeting to speak on behalf of the reform candidates." (ALJD 5:15-16) Kastens testified that he attended the union meeting because he "was filling in for Conductor Sentinel on the Local Lodge," and he never stated that he accompanied Ascension to the meeting or otherwise indicated that he supported her politically. (Tr. 154:3-155:8)

9. The Union excepts to the ALJ's insupportable finding that "[b]ased on their subsequent actions toward Kastens, I have no doubt that [President Frank] Molina conveyed [Kastens's complaint about Howard Johnson's conduct toward Karen Ascension] to Howard Johnson." (ALJD 5 n.25) This finding is mere speculation as there is no evidence in the record to support it.

10. The Union excepts to the ALJ's finding that by December 2013, Molina and Kastens had argued over the latter's criticism of District 70's organizing policies and support for

the International slate of opposition candidates. (ALJD 5:24-25) Molina testified that he did not criticize Kastens over his support for the opposition slate, and Counsel for the General Counsel never produced any text messages allegedly reflected such criticism. (Tr. 559:3-12)

11. The Union excepts to the ALJ's finding that "Kastens initially denied campaigning for Ascension when asked by Molina, but Molina continued to press Kastens about his rumored support for the opposition. Kastens capitulated several weeks later, professed his support for the [opposition] candidates and insisted he would not be swayed." (ALJD 5:25-28) This finding is wholly contrived and does not accurately reflect Kastens or Molina's testimony or any other evidence.

12. The Union excepts to the ALJ's conclusion that "Molina did not deny criticizing Kastens over his support for the [opposition] slate." (ALJD 5 n.26) Molina unequivocally denied criticizing Kastens over his support for the opposition slate. (Tr. 559:3-12)

13. The Union excepts to the ALJ's finding that "Johnson's testimony, that he did not review the e-mail and video attachment to ascertain that it originated with Lehman and was forwarded by Kastens, was utterly incredible" while, at the same time, the ALJ readily accepted (a) the General Counsel's failure to establish "[f]rom whom Lehman got the security department video, and (b) Lehman and Kastens's testimony that neither individual ascertained the source of the video before forwarding it to many others. (ALJD 6 n.33; 5 n.27; GC Ex. 2; Tr. 249:16-19)

14. The Union excepts to the ALJ's finding that Becky Ledbetter sought to have Jeff Clark, a labor relations manager, investigate Kastens's computer usage. (ALJD 6:4-5) There is no evidence whatsoever to support this statement.

15. The Union excepts to the ALJ's conclusion that "Becky Ledbetter's credibility was significantly diminished" based on the General Counsel's unsupported mischaracterization of the evidence relating to her request for Ryan Kastens's keystrokes. (ALJD 5 n.30)

16. The Union hereby submits an exception to the ALJ's conjecture that "[a]side from the fact that [Becky Ledbetter] did not call Kastens or Lehman to express concern over the e-mail, it is hard to imagine how one would get videos attached to e-mails already disseminated 'off the floor.'" (ALJD 6 n.31)

17. The Union excepts to the ALJ's flagrant disregard of uncontested testimony that numerous maintenance employees contacted Becky Ledbetter to express their concern over the dissemination of the confidential security video. (ALJD 6 n.32; Tr. 335:9-337:8, 342:20-22, 387:25-389:15, 392:21-393:10)

18. The Union excepts to the ALJ's conclusion that Reginald Maloney "was not motivated by concern, but other considerations when he communicated with Ledbetter." (ALJD 6 n.32) Maloney testified that when he saw the accident video, he contacted Ledbetter because he was concerned that a video of his past scooter accident would also be made public and widely disseminated to Spirit employees. (Tr. 392:21-393:10) There is no evidence that Maloney was motivated by other considerations, and the ALJ's inability to specifically identify such considerations demonstrates that his finding is based on mere conjecture.

19. The Union excepts to the ALJ's findings and conclusions based on the General Counsel's evidence of an e-mail chain purporting to show Howard Johnson had forwarded Lehman and Kastens's e-mails to the Company. (ALJD 6:11-16) The e-mail from Johnson was reproduced as part of a purported chain of e-mails in the Company's security investigation report, which was offered as GC Ex. 8. The General Counsel also offered the purported e-mail

chain, but it was never authenticated or received in evidence. (GC Ex. 21) (rejected) The purported chain is of highly questionable origin and appears to include one or more e-mails that were copied and pasted in the document. (See GC Ex. 21) (rejected). Absent this rejected e-mail chain, there is no evidence that the Company's investigation of the security video had anything whatsoever to do with Howard Johnson's original e-mail to Jeff Clark.

20. The Union excepts to the ALJ's total disregard of undisputed evidence that a number of unit employees contacted Howard Johnson to express their concern over the dissemination of the security video. (ALJD 6 n.33; Tr. 290:21-292:23)

21. The Union excepts to the ALJ's utter disregard of uncontested evidence that both Howard Johnson and Becky Ledbetter had a close relationship with unit employees in the Maintenance Department because of their long careers in that department. (Tr. 340:21-341:18, 340:1-20) This evidence confirmed the Union's position that many maintenance employees reached out to Johnson and Ledbetter to express their concerns about the video, and that Johnson and Ledbetter acted on their behalf to address such concerns.

22. The Union excepts to the ALJ's characterization of testimony given by Jarrod Lehman regarding his conversation with Becky Ledbetter as "Kastens' credible testimony" for the reason that it incorrectly identifies the person providing said testimony. (ALJD 6 n.35)

23. The Union excepts to the ALJ's conclusion that Frank Molina provided Jeff Clark with Spirit's original copies of social media comments and photographs posted by Lehman and Kastens on February 10. (ALJD 6:21-23) The record reflects that the Company obtained copies of those documents before Clark met with Molina and that the District 70 President merely provided better quality copies of some documents to Clark at his request. There is no evidence

that Molina was the employer's original source of the documents. (Tr. 61:16-64:7, 67:12-72:1; Jt. Ex. 17; GC Exhibits 11, 14)

24. The Union excepts to the ALJ's conclusion that Frank Molina "testified that he initially received copies of incriminating Facebook posts by Lehman and Kastens from the Company." (ALJD 7 n.36) To the contrary, Molina testified, as the record clearly reflects, that he received lesser quality copies of the Facebook posts from Jeff Clark but that the Union already had possession of the same documents. (Tr. 61:16-64:7, 67:12-72:1)

25. The Union excepts to the ALJ's finding that a "February 14 e-mail from Strickland to Molina establishes that Clark obtained the information from the Union." (ALJD 7 n.36) This finding is mere speculation and is unsupported by the record.

26. The Union excepts to the ALJ's determination that "the e-mails between Molina and Clark reveal a collaborative effort to mask the Union's role as the source of the information." (ALJD 7 n.36) There is no evidence supporting such a sinister interpretation of routine communications between Union and Company representatives.

27. The Union excepts to the ALJ's description of Howard Johnson as "Kastens' nemesis" as hyperbole based on mischaracterization of the record.(ALJD 8 n.45)

28. The Union excepts to the ALJ's statement that "Molina mischaracterized the nature of Kastens' situation, however, since the December 'last chance' suspension was not agreed to by Kastens." (ALJD 8 n.50) This conclusion disregards the undisputed fact that Spirit imposed the last chance condition whether or not Kastens accepted it, and his continued employment was precarious as a result.

29. The Union excepts to the ALJ's failure to consider Kastens's admission that it was not necessary for him to provide any additional information to Molina during the

investigation of his grievances "because he [Molina] had all the files. He had all the information he should have needed." (Tr. 577:10-21)

30. The Union excepts to the ALJ's blatant disregard of undisputed evidence that Frank Molina consulted with Tom Hammond, an excellent labor lawyer, regarding the Kastens and Lehman grievances, that Hammond determined the Union was unlikely to succeed in arbitration with respect to either grievance, and that Molina relied on his advice and counsel. (ALJD 9 n.51; Tr. 85:21-87:9, 96:23-97:23, 116:13-18, 186:17-187:8, 483:20-498:16)

31. The Union excepts to the ALJ's conclusion that Kastens's "November and December 2013 suspensions were still active grievances." (ALJD 8 n.50, 9 n.51, 16:1-5) Each of the employer's disciplinary action forms related to those suspensions have the term "closed" written on them. (Jt. Ex. 10 at 2-5; Tr. 505:8-22) Counsel for the General Counsel offered no evidence that those disciplinary actions were still open or that such grievances were still active as of the date of Kastens's discharge, so the ALJ's conclusion has no evidentiary support.

32. The Union excepts to the following statement of the ALJ: "Conspicuously missing from the documents [sent from the Union to Tom Hammond], however, were copies of Kastens' November and December 2013 suspensions and related grievances upon which his termination was based." (ALJD 9:5-7) The e-mail by which those documents were transmitted to Hammond includes an attachment titled *Kastens Disciplinary Action Forms.pdf* – that is, multiple forms were attached – and Hammond testified without contradiction that he received all five disciplinary action forms including the forms related to the closed suspensions. (Tr. 495:14-22, 502:16-24) The ALJ mischaracterized the evidence.

33. The Union excepts to the ALJ's conclusion that Kastens's December 6, 2013 discipline did not constitute a last chance agreement. (ALJD 9 n.51; 15:29-32) Spirit imposed the

last chance provision as a condition of continued employment, and the condition was expressed unequivocally in the disciplinary action form.

34. The Union excepts to the ALJ's conclusion that there was "complicity between Clark and Molina over Lehman's 'selfie' photographs." (ALJD 9 n.55) There is no evidence whatsoever supporting this conclusion, and it distorts the evidence that Molina had met with Clark on a number of occasions in an effort to resolve the grievances.

35. The Union excepts to the ALJ's failure to take into account uncontested evidence that the Company was steadfast in refusing reinstatement for either Kastens or Lehman. (ALJD 9 n.55) (Tr. 74:4-76:2, 99:14-102:3)

36. The Union excepts to the negative inference drawn by the ALJ against the Union for failing to call Jeff Clark to testify regarding Spirit's refusal to reinstate Kastens or Lehman. (ALJD 9 n.55) This negative inference is impermissible since Clark was equally available to all parties and the General Counsel, who carried the burden of proof, also failed to call him to testify. (ALJD 9 n.55)

37. The Union excepts to the ALJ's refusal to draw negative inferences against the General Counsel for failing to call various witnesses not available to Respondents regarding matters on which the General Counsel carried the burden of proof.

38. The Union excepts to the ALJ's insupportable conclusion that Spirit agreed to modify the grievance settlement agreements to eliminate the need for releases signed by Kastens and Lehman at the Union's request. (ALJD 9:22-23) The record shows only that Spirit originally offered settlement terms that required "the concurrence of the individuals" and that the employer's final written proposal did not include a release by Kastens and Lehman. (GC Ex. 15)

39. The Union excepts to the ALJ's reliance on Kastens's disagreement with the Union's decision not to arbitrate his grievance as a basis for finding that the Union violated Section 8(b)(1)(A) of the Act as this reflects a misapplication of prevailing law. (ALJD 10:9-11, 15:28-29, ALJD 15:31-32)

40. The Union excepts to the ALJ's mischaracterization of the testimony that "Betty Ledbetter [sic], Johnson and Eldridge suddenly pulled up" to a plant location near a location where Kastens and Jay Cronk had been campaigning. (ALJD 10 n.61) This statement erroneously suggests that these Union representatives rushed to the area in an aggressive and confrontational manner.

41. The Union excepts to the ALJ's findings regarding the verbal altercation between Kastens and Howard Johnson on April 11, 2014 because such findings are against the great weight and preponderance of the evidence. (ALJD 10:33-11:9)

42. The Union excepts to the ALJ's finding that "Johnson defied Kastens by telling him to 'shut up before I beat your ass' and he would see that Kastens was not reinstated by the Company." (ALJD 10:35-37) This finding disregards the totality of the credible evidence.

43. The Union excepts to the ALJ's speculative conclusion that Howard Johnson must have provoked Kastens to yell "hit me" and "take your best shot" at Johnson because the overwhelming weight of the evidence establishes that Kastens provoked the entire confrontation. (ALJD 10:35-11:1; 11 n.62)

44. The Union excepts to the ALJ's decision to receive in evidence the documents marked as General Counsel Exhibits 4 and 5 and all testimony regarding those irrelevant and prejudicial exhibits. (ALJD 11 n.64) The evidentiary ruling contravened the Federal Rules of

Evidence in several respects, constituted inadmissible hearsay, violated the Union's due process rights, and defied logic.

45. The Union excepts to the ALJ's discussion, analysis and findings in their entirety to the extent such findings are based on a temporary restraining order sought by Ryan Kastens against Howard Johnson in a state court. (ALJD 11:11-26, n.64) The Union was not a party to that undefended proceeding and there was no hearing, so the ALJ's evidentiary ruling contravened the Federal Rules of Evidence, constituted inadmissible hearsay, violated the Union's due process rights, and was prejudicial in the extreme.

46. The Union excepts to the ALJ's conclusion that Kastens's May 1, 2014 Facebook posts threatening to break Howard Johnson's hip and alluding to Kastens's concealed weapon were "not meant by Kastens as a threat, as the Union suggests, but rather an attempt to publicize his latest gain in the effort to oust Howard Johnson from his union position." (ALJD 11 n.65) This benign characterization of a severe threat by the Charging Party to inflict physical harm on Johnson is notable for the extent to which the ALJ manipulated the testimonial and documentary evidence.

47. The Union excepts to the ALJ's finding conclusion that Kastens did not lose protection of the Act "because I found that Kastens did not threaten Johnson." (ALJD 13:2-3) This finding conflicts with clear and unequivocal evidence that Kastens plainly threatened Johnson with physical harm in a Facebook post, and obscures evidence that Kastens was the aggressor in his April 2014 confrontation with Johnson.

48. The Union excepts to the ALJ's unwarranted departure from Board precedent by conflating two separate legal frameworks – the duty of fair representation framework and the

Wright Line framework – in his analysis regarding whether the Union attempted to cause or did cause the discharge of Kastens and Lehman. (ALJD 13:18-14:37)

49. The Union excepts to the ALJ's conclusion that the Union took any action that could constitute an attempt to cause the discharge of Kastens or Lehman. (ALJD 13:41-14:37) This conclusion is not supported by the evidence of record.

50. The Union excepts to the ALJ's implicit assumption that Howard Johnson's e-mail inquiry regarding the accident video was the employer's first knowledge of the e-mail chain and video notwithstanding the General Counsel's abject failure to present any evidence supporting such an assumption. (ALJD 14:31-33) This assumption is not supported by the evidence.

51. The Union excepts to the ALJ's presumption that Respondents breached the duty of fair representation in relation to his conclusion that the Union caused or attempted to cause the employer to discharge the Charging Parties. (ALJD 14:34-35) This presumption misapplied Board precedent and is not supported by the totality of the evidence.

52. The Union excepts to the ALJ's statement that "it is hard to imagine why employees would express concern about [the accident video] to [Howard Johnson] instead of a Company supervisor or manager." (ALJD 13:44-45) This statement conflicts with the undisputed testimony that Johnson was a trusted Union representative who had maintained a close working relationship with maintenance employees for many years; and it conflicts with the ALJ's separate conclusion that it was improper for Johnson to express the employees' concerns about the video to Spirit management.

53. The Union excepts to the ALJ's conclusion that "Howard Johnson's alleged interest in the accident video's distribution was contrived" and that "Johnson forwarded it solely

because of the Union's animus for Kastens and Lehman due to their union activity." (ALJD 13:44-45) There is no evidentiary basis for these conclusions other than the self-serving testimony of Ryan Kastens and Jarrod Lehman.

54. The Union excepts to the ALJ's conclusion that "[a]dditional evidence of union animus is evident from Betty [sic] Ledbetter's January 13 effort to have the Company review Kastens' computer usage, and Molina's emails to the Company forwarding Lehman's incriminating statements about the Company and an incriminating photograph taken by Lehman within the facility." (ALJD 14:1-4) This conclusion is not supported by the evidence.

55. The Union excepts to the ALJ's conclusion that a union can cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3), and thereby violate Section 8(b)(2), by causing or attempting to cause an employer to take an action that would not constitute discrimination against an employee in violation of Section 8(a)(3) if the employer acted without suggestion or compulsion. (ALJD 14:6-16) This conclusion constitutes a clear departure from Board precedent.

56. The Union excepts to the ALJ's characterization of the Union's position in the following statement: "Thus, argues the Union, the fact that the Company was not charged with acting discriminatorily toward either Kastens or Lehman necessarily absolves the Union of any corresponding violation." (ALJD 14:9-11) This misstated the Union's position.

57. The Union excepts to the ALJ's determination that the Union failed to present any legitimate reason for Howard Johnson to forward the accident video to the Company. (ALJD 14:18-35) There is abundant evidence establishing that Howard Johnson acted at the request, and in the best interests, of a number of unit employees in the Maintenance Department.

58. The Union excepts to the ALJ's statement that Respondents relied on *Graphic Communication Local 1-M*, 337 NLRB 662, 673 (2002) to support their position. (ALJD 14:20-24) The Union has never expressed reliance on *Graphic Communication* in its post hearing brief or any other written or oral arguments in this case.

59. The Union excepts to the ALJ's conclusion that "Howard Johnson's forwarding of the accident videos [sic] to company management was reasonably likely to result in disciplinary action." (ALJD 14:31-33) This conclusion is not supported by the record; to the contrary, the evidence shows that Spirit either already knew or inevitably would have discovered that the Charging Parties forwarded the confidential security video to many employees and non-employees.

60. The Union excepts to the ALJ's conclusion that the Union's "processing of Kastens' claim in such a perfunctory manner was clearly arbitrary." (ALJD 15:14-15) This conclusion is not supported by the evidence.

61. The Union excepts to the ALJ's determination that "the only record evidence produced revealed [Frank Molina's] focus on keeping Kastens uninformed. Indeed, Molina took that approach to an extreme by convincing a reluctant company manager to agree to a settlement without Kastens' signature." (ALJD 15:23-25) This determination sharply conflicts with the record as there is no testimonial or documentary evidence that Molina convinced, or attempted to convince, a managerial agent to enter into a settlement agreement without Kastens's signature.

62. The Union excepts to the ALJ's conclusions that the Union processed Kastens's discharge grievance in bad faith or a discriminatory manner (ALJD 15:34-40; 16:16-17) These conclusions are based on a misapplication of law and they have no meaningful evidentiary support.

63. The Union excepts to the ALJ's conclusion that Frank Molina's testimony regarding Spirit's unwavering steadfast insistence on discharging Ryan Kastens was undermined by Justin Welner, who acknowledged that he had little knowledge of Kastens' discipline. (ALJD 15:40-42) Werner's testimony did not derogate from Molina's testimony in any respect because Welner, in his capacity as Vice President of Labor Relations, has little to do with administration of disciplinary actions at the plant level or with the administration of grievances under the CBA.

64. The Union submits an exception to all remedies that the ALJ has recommended. (ALJD 16:39-18:29) These recommended remedies are based on erroneous findings of fact and conclusions of law.

65. The Union excepts to the ALJ's recommended order with respect to the following directives set forth at ALJD 17:6-18:23:

> 2. Take the following affirmative action necessary to effectuate the policies of the Act.
>
> Make Ryan Kastens and Jarrod Lehman whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.
>
> Within 14 days from the date of the Board's Order, request that Spirit Aerosystems (the Company) offer Ryan Kastens full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. If the Company refuses to reinstate Kastens, the Union shall request that the Company process the grievances over his suspensions and discharge, and pursue the grievances in good faith with due diligence, including permitting Kastens or another representative of his own choosing present at the grievance-arbitration proceedings at the Union's expense.
>
> Within 14 days from the date of this Order, remove from our files any reference to the discharge of Ryan Kastens, and within 3 days thereafter, notify him in writing that we have done so and that we will not use the discharge against him in any way. If the Company agrees to reinstate Kastens before or after processing the grievances over his suspension and discharge, the Union shall also request that the Company remove from its files any reference to Kastens'

discharge and notify him that this has been done and the discharge will not be used against him in any way.

Within 14 days after service by the Region, post at its union office in Wichita, Kansas copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Union's authorized representative, shall be posted by the Union's and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Union customarily communicates with its members by such means. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Union has gone out of business or closed its Wichita, Kansas office, the Union shall duplicate and mail, at its own expense, a copy of the notice to all current Union members and former members at any time since February 14, 2014.

Sign and return to the Regional Director sufficient copies of the notice for physical and/or electronic posting by the Company, if willing, at all places or in the same manner as notices to employees are customarily posted.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

Each of these directives is based on erroneous findings of fact and conclusions of law.

66. The Union excepts to the ALJ's recommended *Notice to Members*. (ALJD 19-20) This recommended Notice is based on erroneous findings of fact and conclusions of law.

67. The Union excepts to the ALJ's use of so-called errata to modify the substance of his original Decision and Order. This unexplained modification was a departure from Board precedent, contravened the Board's Rules and Regulations, and violated Respondents' rights of due process.

68. The Union excepts to the ALJ's failure to consider or rule on *Respondents' Motion to Dismiss Complaint as Amended* (ALJ Ex. 1), which was filed February 26, 2015 and which was based on the evidence presented during the General Counsel's case-in-chief. The

motion should have been granted at the time it was presented since the General Counsel had failed to establish a prima facie case that Respondents had violated the Act.

69. The Union excepts to the ALJ's clearly erroneous decision to overrule *Respondents' Motion to Dismiss Complaint as Amended* (ALJ Ex. 1), which was filed February 26, 2015 and which was based on the evidence presented during the General Counsel's case-in-chief. The ALJ's subsequent denial of the motion was impermissibly based on his findings and conclusions with respect to all of the evidence presented during the entire proceeding, including the Union's case-in-chief and the General Counsel's rebuttal. (ALJD 16 n.67)

70. The Union excepts to the ALJ's violation of the *Jencks* Rule at hearing by refusing to allow Respondents' counsel to use an affidavit submitted by Charging Party Jarrod Lehman for the purpose of examining Lehman when he was recalled to testify after his direct examination had been completed earlier in the proceeding. (Tr. 532:21-533:24)

71. Respondents except to the ALJ's findings of fact and conclusions of law in their entirety because they conflict with the law, policy, evidence and logic.

72. The ALJ ignored or misapplied the evidence that establishes Respondents did not violate the Act.

73. The ALJ erroneously determined that the General Counsel met his burden of proving that Respondents violated the Act.

74. The ALJ erroneously determined that Respondents had failed to establish their affirmative defenses.

75. The ALJ erroneously determined that Ryan Kastens and Jarrod Lehman had not lost the protection of the Act by reason of their gross misconduct.

76. The ALJ erroneously determined that Respondents had failed to show they would have settled the discharge grievances absent the Charging Parties' union activities.

77. The ALJ erroneously determined that Respondents had failed to show they would have taken the same action regarding the security video absent the Charging Parties' union activities.

78. The ALJ's credibility determinations are inconsistent with the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.

79. The ALJ's analysis omitted highly relevant evidence on numerous critical matters and mischaracterized the state of the record.

80. The ALJ's Decision and Order raises significant questions of law or policy because of the departure from Board precedent.

Dated June 10, 2015.

Respectfully submitted,

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Certificate of Service

The undersigned attorney certifies that on June 10, 2015, he served the foregoing document on the Board, Office of the Executive Secretary, Region 14/Subregion 17, and Counsel for the General Counsel via electronic filing and on the parties listed below via electronic mail.

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT 70 and LOCAL LODGE 839 (Spirit AeroSystems)

And **Case 14-CB-133028**

RYAN KASTENS, An Individual

And

SPIRIT AEROSYSTEMS, INC.

MEMORANDUM BRIEF IN SUPPORT OF RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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EXHIBIT C

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In accordance with Section 102.46 of the Board's Rules and Regulations, Respondents International Association of Machinists and Aerospace Workers, AFL-CIO, District 70 and Local Lodge 839 (referred to jointly as *Respondents* or *the Union*) file their Memorandum Brief in Support of Respondents' Exceptions to the Administrative Law Judge's Decision as follows.

Introduction

Administrative Law Judge Michael A. Rosas issued a Decision and Order dated April 29, 2015 and amended May 5, 2015. The ALJ determined that the Union violated the National Labor Relations Act in several respects. Specifically, the ALJ concluded that the Union violated Sections 8(b)(1)(A) and (2) "[b]y attempting to cause and causing the Company to discharge Ryan Kastens and Jarrod Lehman on February 14, 2014, because of their dissident union activity and/or other protected concerted activities" (ALJD 16:25-27); violated Section 8(b)(1)(A) "[b]y threatening to cause bodily harm to Kastens on April 11, 2014, and impede his efforts to obtain reinstatement because he engaged in protected concerted activities" (ALJD 16:29-31); and violated Section 8(b)(1)(A) "[b]y discriminatorily and/or arbitrarily processing Kastens' outstanding grievances against the Company." (ALJD 16:33-34)

In reaching these conclusions, the ALJ dispensed his own brand of industrial justice by disregarding many key facts, mischaracterizing testimonial and documentary evidence, and misapplying prevailing legal standards in order to find purported violations of the Act where none existed. Additionally, the ALJ made clearly erroneous evidentiary rulings in favor of the General Counsel, and he violated the *Jencks* Rule by refusing to direct Counsel for the General Counsel to produce Charging Party Jarrod Lehman's affidavit after he had previously testified on direct examination. (Tr. 532:21-533:24). These rulings, together with a number of credibility determinations that defied logic and contravened the great weight and preponderance of the

evidence, manifested the ALJ's outcome driven analysis. For these reasons, and as explained below, the ALJ erred in finding that the Union violated the Act. Accordingly, the Board should not adopt the ALJ's Decision and Order but should instead dismiss the amended Complaint.

Statement of the Case

I. Statement of Facts

A. Spirit AeroSystems and the Union

Spirit AeroSystems, Inc. (*Spirit*) is engaged in the manufacture and sale of aerostructures for commercial, military and business aircraft, and it maintains its headquarters and manufacturing facility in Wichita, Kansas. (GC Ex. 1-P at 2) Respondent labor organizations are the exclusive bargaining agent for a unit of approximately 7,000 production and maintenance employees employed by Spirit in Wichita under a collective bargaining agreement (*CBA*) effective from June 2010 to June 2020. (Jt. Ex. 1; GC Ex. 1-P at 3; Tr. 27:1-6)

B. Ryan Kastens and Jarrod Lehman

Spirit employed Charging Party Ryan Kastens from January 8, 2010 until his discharge on March 5, 2014. (Tr. 126:6-19) Spirit also employed Charging Party Jarrod Lehman from October 26, 2007 until his discharge on March 6, 2014. (Tr. 233:2-11) Both Charging Parties were members of Local Lodge 839 at all relevant times. (Tr. 126:20-127:3, 233:15-19)

Kastens developed an extensive disciplinary record at Spirit. Nevertheless, Union officials supported and defended Kastens throughout his employment. In two instances when the employer sought to discipline Kastens for poor performance involving his use of an incorrect drilling technique on certain parts, Howard Johnson, an In-Plant Representative, intervened on Kastens's behalf and persuaded management not to make a disciplinary record of those performance deficiencies. (Tr. 301:14-302:25)

On March 14, 2013, Spirit issued a documented verbal warning to Kastens for parking his vehicle in a no-parking zone and for failing to display a parking pass. (Jt. Ex. 10 at 5) On May 6, less than two months later, the employer issued a written warning to him for the same policy violations. (Jt. Ex. 10 at 4) Then, on November 8, the employer imposed a three-day suspension against Kastens for an unexcused absence and his failure to report to management on November 4. (Jt. Ex. 2) That disciplinary form stated in part: "Future incidents of this nature will result in further corrective action up to and including termination of employment." (Jt. Ex. 2) There was also extensive testimony adduced at hearing that Kastens had requested Union officials to falsely represent to Spirit that his unexcused absence was due to union activity; the Union refused his request to perpetrate such a fraud on the company. (Tr. 103:13-105:7, 349:23-352:8)

Kastens's next act of misconduct occurred less than one month later on December 6, 2013. The employer's disciplinary action form stated that he had "misused company time and misrepresented [himself] as a union steward in investigating an issue in the shop area." (Jt. Ex. 4) Spirit's Disciplinary Guidelines, designated OP3-179, established a discipline scheme which generally involved the following progressive disciplinary steps: (1) verbal counseling with written documentation; (2) written documentation such as a disciplinary memorandum; (3) suspension with or without pay; and (4) termination of employment. (Jt. Ex. 14; Tr. 464:5-16) In accordance with this policy, Kastens's supervisor sought to have him discharged in December 2013, but District 70 President Frank Molina intervened and saved Kastens's job by convincing the supervisor to reduce the punishment to a three-day suspension. (Tr. 462:25-463:4)

Rather than summarily discharging Kastens, Spirit imposed a so-called *last chance agreement* in its disciplinary action form which provided: "Upon receipt of this 4th Disciplinary Memo, if you receive any type of discipline in the next 12 months, you will be terminated for

generally unacceptable misconduct." (Jt. Ex. 4; Tr. 91:22-93:6; Resp. Ex. 9) This last-chance condition is significant, because Spirit's Disciplinary Guidelines provided that if an employee received a fifth disciplinary action within a 12 month period, his discharge was automatic. (Tr. 519:1-17; Jt. Ex. 14 at 6-7) (*Unacceptable Behavior – 1st Offense, termination,* Section 3.4M)

C. Lehman and Kastens Disseminated a Confidential Security Video in Violation of Company Policy

On January 27, 2014, Lehman sent an e-mail from his work account titled *Why you should always look both ways* to nine separate e-mail addresses, including two e-mails which were directed to individuals outside of the Spirit e-mail system. (GC Ex. 8 at 5). Lehman noted the location of the subject incident in the body of the e-mail as *MacArthur crossing Wichita, Ks*. and he attached a confidential video recorded by a Spirit security camera that was directed toward an intersection of two gated entrances to the plant. (GC Ex. 8; Jt. Ex. 20)

The attached video, approximately two minutes in duration, showed a collision between a truck and a Spirit scooter on December 26, 2013. (Jt. Ex. 20) The driver of the scooter was a unit employee in the Maintenance Department. Lehman confirmed that the video had a date and time stamp reflecting the date of the collision, which indicated that the video was captured from a camera such as a security or traffic camera. (Tr. 249:23-250:12) Lehman also stated that at the time he gave an affidavit to a Board agent, he believed that the video probably originated in the Company's Security Department. (Tr. 257:3-6)

Lehman sent the e-mail and attachment to Kastens, who soon forwarded it to approximately 71 separate e-mail addresses, 11 of which were outside Spirit's e-mail system. (GC Ex. 8 at 3-6; Tr. 194:20-195:6) The confidential security video was rapidly disseminated in the plant as a result of Lehman and Kastens's e-mails. Due to this widespread dissemination of the video, a number of unit employees who received or viewed the video contacted various

Union representatives, including Assistant Business Representative Becky Ledbetter and Howard Johnson, to inquire why the video was being circulated because such a confidential video had never been released to employees previously. (Tr. 335:17-24; 290:21-291:3)

After being contacted by several unit employees, Ledbetter (to whom Kastens had previously e-mailed the video) forwarded the video to the Union's first shift safety representative, Kenneth Tullis, and asked him to call her to discuss the matter. (Resp. Ex. 12; Tr. 334:12-25) Ledbetter also forwarded the e-mail with attachment to Howard Johnson, who handled problems for maintenance employees. (Tr. 335:9-338:22) Ledbetter's objective was to stop further circulation of the accident video on the shop floor and to allay the concerns of various maintenance employees. (Tr. 338:6-9, 343:2-23)

In response to these inquiries and concerns expressed by unit employees, Johnson contacted Jeff Black, Senior Manager of Labor Relations, via e-mail and asked the following:

> We were told that this video shouldn't have been released …. im getting calls about this, people are forwarding this message internally as well as outside spirit. What is the deal with this video?

(GC Ex. 8 at 2) (punctuation and capitalization in original). Johnson did not review the e-mail to determine who had sent the original e-mail before sending this inquiry, and he was not aware that either Kastens or Lehman had disseminated the video. (Tr. 296:9-21)

By forwarding this confidential security video, Lehman and Kastens violated several policies maintained by Spirit governing the use of electronic mail and the release of Company information. The Company's Acceptable Use Policy, designated as OP15-810, provided in pertinent part: "Users shall not provide Spirit information to parties outside Spirit, unless authorized by the information owner and Communications." (Jt. Ex. 11 at 7) The policy states that employees who use their personal e-mail accounts "must ensure that personal e-mail does

not adversely affect the company or its public image or that of its customers, partners, associates or suppliers" and further ensure that any personal use of Spirit computer resources "would not cause embarrassment to the company." (Jt. Ex. 11 at 11, 15) It also provided that sensitive and proprietary information may only be transferred within the Company's secure server and not by public e-mail systems. (Jt. Ex. 11 at 15)[1]

Justin Welner, Spirit's Vice President of Human Resources, and Jason Neal, Senior Manager of Security, testified that the policies violated by Kastens and Lehman were in place to protect the Spirit's proprietary interests as well as to protect the privacy and security of both the Company and its employees. (Tr. 283:20-22; 284:14-15, 514:7-20) Under the Company's Disciplinary Guidelines, violations of these policies warranted termination in the first instance. (Jt. Ex. 14 at 7) (*Unacceptable Behavior – 1st Offense, termination,* Section 3.4L)

At hearing, Kastens admitted that his use of Spirit's computer resources and e-mail system to transmit the security video violated the internet and e-mail policies, and that external disclosure of the video to people who were not employees also violated Company policy. (Tr. 196:22-197:3; 195:2-9) Lehman also admitted that his disclosure of the video via e-mail violated Company policy, and that such disclosure was severe misconduct which called for summary discharge under Section 3.4L of the Disciplinary Guidelines. (Tr. 268:7-13; 269:23-270:8)

D. Spirit Discharged Kastens and Lehman for Gross Misconduct

On February 13, 2014, security personnel escorted Kastens out of the plant, and he was suspended pending an investigation of the disclosure of the confidential video. (Tr. 143:5-144:21) The next day he filed a grievance contesting his suspension with District 70 and

[1] *See also* Jt. Ex. 13 (*Release of Information Outside Spirit AeroSystems* (OP2-17), which delineated a number of criteria which must be met before any Spirit information was distributed outside the Company); Jt. Ex. 12 (policies and rules prohibiting auto-forwarding of e-mails and requiring encryption of any information which, if disclosed, could harm Spirit's competitive position or damage its reputation, among other provisions).

conferred with Frank Molina regarding the matter. (Tr. 145:9-18, 146:2-21) Spirit then removed Lehman from the facility and suspended him pending investigation on February 14. (Tr. 240:2-11) He promptly filed a grievance regarding his suspension. (Tr. 240:12-17; Jt. Ex. 15)

On February 24, a security investigator interviewed Lehman, and Lehman presented a signed statement regarding the circumstances under which he obtained and then disclosed the confidential video. (Tr. 241:8-242:11; GC Ex. 20) On February 25, a security investigator interviewed Kastens, who admitted that he had sent the video to numerous employees and eleven others not employed by Spirit whom he thought "would have been interested to see" the video. (GC Ex. 2) He professed not to know how Lehman had acquired the video. (GC Ex. 2)

On March 3, Spirit investigators interviewed Lehman again by telephone regarding two Facebook postings he had made. (GC Ex. 13) One posting was a photo Lehman had taken of himself on the shop floor in violation of Spirit's *Camera-enabled Devices* policy. (GC Ex. 11; Jt. Ex. 12)[2] In a signed statement, Lehman admitted: "I've heard that we can't take photos in the shop. It is my understanding that we can't take any pictures in the plant." (GC Ex. 13 at 3)

On March 5, 2014, Spirit discharged Kastens. (Jt. Ex. 7) The employer's disciplinary action form stated: "Ryan, an investigation has revealed that you forwarded an e-mail external to the Company which contained a Spirit video. This behavior is unacceptable and will not be tolerated." (Jt. Ex. 7). Then, on March 6, 2014, Spirit discharged Lehman. (Jt. Ex. 9) The disciplinary action form concerning his discharge stated: "Jarrod, an investigation revealed that you forward [sic] an e-mail external to the Company which contained a Spirit video. You also had a picture posted on your Facebook account of you which was taken in a Spirit shop area. This behavior is unacceptable and will not be tolerated." (Jt. Ex. 9)

[2] Spirit's policies prohibited the use of any camera-enabled devices in the workplace without a camera permit. (Jt. Ex. 12 at 5)

E. The Union Investigated and Processed the Charging Parties' Grievances

After Lehman and Kastens filed their discharge grievances, District 70 President Frank Molina informed both grievants that he was investigating the grievances; Molina conferred again with Kastens on a number of occasions. (Tr. 147:15-148:14, 553:16-25) In-Plant Representative Tim Johnson was responsible for investigating and pursuing the grievances at the outset. (Tr. 567:8-10) At Molina's direction, Johnson represented the Charging Parties in their interviews by Spirit security investigators and he attempted to resolve the grievances. (Tr. 567:8-16, 551:22-25) Johnson made thorough investigation notes for the Union's grievance files. (Tr. 561:18-562:2) Both Lehman and Kastens expressed their appreciation to Tim Johnson for the work he performed during his investigation. (Tr. 578:7-9, 544:18-545:1)[3]

After the Company discharged Kastens and Lehman, their suspension grievances were converted to discharge grievances and designated *S/T* by the Union. (Tr. 548:1-8; Jt. Ex. 15) Johnson then sent formal letters to Molina referring the grievances to District 70, and Molina began to process the grievances. (Tr. 567:8-18, 544:12-545:6; Jt. Exhibits 5 at 3; 19) Molina followed the Union's standard procedures by discussing the status of the grievances with Tim Johnson (Tr. 552:18-21; 551:1-9), interviewing Kastens (Tr. 568:9-23, 575:4-11), and gathering all available documents and information (GC Ex. 7; Tr. 39:16-40:6, 548:9-549:3). Molina then submitted information requests regarding both individuals to Jeff Clark, Director of Labor Relations, to which the Company responded with more documents and information. *See id.* Kastens admitted that he did not need to provide any additional information to Molina "because he [Molina] had all the files. He had all the information he should have needed." (Tr. 577:10-21)

[3] On the other hand, then In-Plant Representative Howard Johnson had no role whatsoever in the investigation or processing of these grievances, which the ALJ noted. (ALJD 8 n.45; Tr. 299:13-19, 97:24-98:9) Howard Johnson never processed grievances after Step Two; and in this case it was not disputed that he had no discussions with Frank Molina or any other Union official or Union attorney Tom Hammond regarding these grievances. (Tr. 298:8-18, 299:13-19, 507:14-18, 97:24-98:9)

Soon after receiving all available information from the Company, Molina sought the advice of Tom Hammond, an experienced and reputable labor attorney who had represented District 70 since the mid-1980s, regarding the merits of both discharge grievances and a strategy for resolving them. (Tr. 553:6-15, 96:23-25, 483:20-486:10) Molina and Hammond discussed the grievances, and Molina's administrative assistant sent all relevant documents, including the disciplinary records, grievances and policies, to Hammond via e-mail on March 18, 2014. (Tr. 492:22-493:7; Resp. Ex. 6)

Hammond, who was very knowledgeable of the CBA and Spirit's disciplinary policies, reviewed all relevant documents soon after he had received them. (Tr. 509:7-22) Sometime between March 18 and April 1, the attorney contacted Molina and informed him that it was extremely unlikely the Union could prevail on either grievance at arbitration. (Tr. 493:8-18, 495:5-497:20, 553:16-17) Hammond recommended that the Union not arbitrate either discharge grievance. This legal opinion was based on the fact that the undisputed policy violations were first-time terminable offenses; Kastens's termination was automatic under the Disciplinary Guidelines; and that Kastens was subject to a last-chance condition after his most recent disciplinary action. (Tr. 495:10-497:1, 504:13-505:7; Jt. Ex. 4)

Molina searched District 70's records archive for past arbitration awards which might support the Union's position in arbitration, but he was unable to locate any supportive awards. (Tr. 555:1-13; Resp. Ex. 11) Based on the facts of the case, Tim Johnson's investigation, Molina's own investigation and research, consideration of the Union's available financial resources, and the advice of counsel, Molina decided not to submit the grievances to arbitration. (Tr. 554:13-25; 55:16-22, 73:13-24) Molina informed Lehman of his determination and his efforts to settle the grievances, and Lehman expressed his appreciation for Molina's efforts. (Tr.

555:23-556:21, 556:23-24, 267:18-20)

Molina attempted to negotiate each individual's reinstatement in discussions with Jeff Clark, but the Company refused. (Tr. 74:4-76:2, 99:14-102:3) Molina then sought a financial settlement of $50,000 for each grievant, which was also refused. Eventually, Molina negotiated the best grievance settlements that he could obtain – $5,000 for Lehman and $2,000 for Kastens; the agreements were executed on May 16. (Tr. 562:3-563:6; Jt. Exhibits 8, 16 at 3)[4] Molina then informed both Kastens and Lehman that he had negotiated a settlement that resolved their grievances. (Tr. 266:13-267:1, 152:21-153:4) Both Kastens and Lehman accepted the settlement agreement by negotiating Spirit's settlement checks. (Tr. 266:22-266:23, 186:1-4, 99:6-13)

F. Kastens Instigated a Verbal Confrontation with Howard Johnson

Several witnesses testified regarding events that took place at an entrance to Spirit's facility on April 11, 2014. At that time the Grand Lodge was in the process of conducting an election of officers and various candidates were engaged in campaigns. Union members at Spirit voted in Wichita on April 12. (Tr. 206:5-9) Kastens, who had been discharged several weeks earlier, went to the plant on the afternoon of April 11 in order to hand out campaign literature on behalf of a slate of candidates headed by Jay Cronk, who was seeking election to the office of International President. (Tr. 157:3-22, 205:6-9, 206:5-17)

Union Organizer Juan Eldrige, Becky Ledbetter and Howard Johnson were also present; they had gone to the location together to campaign. (Tr. 355:5-16, 402:14-19) At some point after their arrival, District 70 Business Representatives Steve Elder and Brent Allen also arrived to campaign in that area. (Tr. 419:1-12, 429:11-430:9) The Union representatives had decided to distribute campaign literature at that particular time because the plant shifts were changing,

[4] The General Counsel did not call Clark to testify, and Molina's description of his negotiations with Clark were never questioned or controverted by any testimony or evidence.

which meant that hundreds of employees would be available to receive campaign literature while entering or exiting the facility. (Tr. 355:17-23; 430:2-9)

Kastens soon turned his attention to Howard Johnson, who was standing across the street in closer proximity to Cronk's position. (Resp. Exhibits 13, 13A) Kastens charged across the street – which was described by witnesses as five lanes of traffic over a distance of 30 yards – to confront Johnson. (Tr. 362:13-364:4, 361:12-15, 408:19-409:7) Kastens immediately intruded in Johnson's space only inches from his face and began shouting at him, repeatedly yelling, "Hit me!" (Tr. 304:2-8, 306:24-307:4, 407:21-25, 421:10-13, 431:1-10) Kastens attempted to provoke Johnson into striking him, inviting Johnson to take his best shot. (Tr. 159:9-11, 444:5-14) Kastens admitted that he "was upset and emotions took over." (Tr. 190:1)

Johnson did not "take the bait" and strike Kastens or take any other offensive action. (Tr. 410:10-12, 432:5-10, 189:17-22) Kastens and Cronk alleged that Johnson told Kastens he would "beat his ass" and that he would make sure Kastens never returned to his job at Spirit. (Tr. 159:3-8, 209:2-10) But numerous witnesses testified Johnson never made any threats and he never used any profanity. (Tr. 306:3-7 404:7-13, 412:2-5, 422:8-10, 425:19-24, 446:13-17, Tr. 434:12-22) Significantly, Kastens admitted that he did not regard his conduct at that time as "the acts of a person who is in fear of being physically harmed or beaten up." (Tr. 202:16-20)

Kastens did not contact the police or submit any type of report, and neither he nor Cronk reported to Spirit security that any threats were made against them. (Tr. 192:21-193:4, 476:23-477:1, 211:11-19) Indeed, the Spirit security supervisor at the scene stated that "there was no [incident] report needed at that time" because "[t]here was basically nothing to report." (Tr. 475:1-8)

After the events of April 11, Kastens publicly threatened Howard Johnson on Facebook.

(Tr. 193:21-194:11) On May 1, 2014, Kastens posted the following:

> I would break his [Johnson's] hip it if made it that far. Better to have the paperwork watching my ass. I have my conceal carry. I'm not worried about him.

(Resp. Ex. 2) Kastens also posted a comment on Facebook that he was pushing his Johnson's removal from office more than anything. (Resp. Ex. 2) Kastens admitted that he is seeking to have Johnson removed from office because he wants to take his Union position. (Tr. 535:1-8)

II. Procedural History

On July 18, 2014, Ryan Kastens filed an unfair labor practice charge against the Union in Case 14-CB-133028. (GC Ex. 1-A) On September 10, Kastens filed a first amended charge and Jarrod Lehman joined him as a Charging Party. (GC Ex. 1-F; Tr. 530:7-15) Kastens then filed a second amended charge on November 20. (GC Ex. 1-K) The Regional Director issued a Complaint and Notice of Hearing on November 26, and an Amendment to the Complaint on February 11, 2015. (GC Exhibits 1-P, 1-U) ALJ Michael A. Rosas held a hearing in this matter on February 19-20 and 26-27, 2015 in Wichita, Kansas. The parties filed post hearing briefs on April 3. The ALJ issued his Decision and Order on April 29, 2015, and then issued an Amended Decision and Order (titled *Errata*) on May 5, to which the Union has filed exceptions in a separate document. All exceptions are incorporated herein by reference.

Questions Presented

1. Whether the ALJ erred in determining that Respondents violated Sections 8(b)(1)(A) and (2) by attempting to cause and causing the employer to discharge Ryan Kastens and Jarrod Lehman because of their union activity. (Exceptions 1, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 64, 65, 66)

2. Whether the ALJ erred in determining that Respondents violated Section 8(b)(1)(A) by threatening to cause bodily harm to Kastens and to impede his efforts to obtain reinstatement

because of his union activity. (Exceptions 2, 4, 27, 40, 41, 42, 43, 44, 45, 46, 47, 64, 65, 66, 75)

3. Whether the ALJ erred in finding that Respondents violated Section 8(b)(1)(A) by processing Kastens' grievance in an arbitrary or discriminatory manner. (Exceptions 3, 7, 10, 11, 12, 14, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 54, 60, 61, 62, 63, 64, 65, 66, 76)

Argument and Authorities

I. The ALJ Disregarded Many Established and Admitted Facts and Mischaracterized the Evidence

Where exceptions to an ALJ's decision and recommended order have been filed, the Board is not bound by the findings of the ALJ. Instead, "the Act commits to the Board itself the power and responsibility of determining the facts," and the Board must base its findings on a de novo review of the entire record. *RC Aluminum Indus., Inc.*, 343 NLRB 939, 942 n. 1 (2004) (citing *Standard Dry Wall Prods*., 91 NLRB 544, 544-45 (1950), *enf'd*, 188 F.2d 362 (3d Cir. 1951)). An ALJ's credibility determinations based exclusively on a witness's demeanor are entitled to deference from the Board. But where an ALJ's finding is based on some factor other than demeanor, the Board will undertake an independent evaluation of the credibility of the evidence. *Canteen Corp.*, 202 NLRB 767, 769 (1973). For instance, the Board will substitute its own credibility findings for those of the ALJ when the ALJ's findings are based "largely upon an objective analysis of [witness] testimony" and "not exclusively on his demeanor as a witness." *Briggs IGA Foodliner*, 146 NLRB 443, n. 6 (1964).

Additionally, "even demeanor based credibility findings are not dispositive when the testimony is inconsistent with 'the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.'" *Stevens Creek Chrysler Jeep Dodge, Inc*., 357 NLRB No. 57 at *5 (Aug. 25, 2011) (citations omitted). The deference to credibility findings is further diminished when the ALJ "omits reference to the

highly relevant testimony on a critical matter and mistakenly characterizes the state of the record." *Carlton Paper Corp*. 173 NLRB 153, 156, n. 9 (1968).

In this case, the General Counsel contends that the ALJ's findings of fact are based on his credibility findings and primarily centered on the witnesses' demeanor, so they should not be disturbed. However, as shown below and as described in Respondents' Exceptions, the ALJ mischaracterized, distorted or completely ignored many important facts and based his findings on unreasonable inferences and suppositions. An ALJ "cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic work 'demeanor.'" *Permaneer Corp.*, 214 NLRB 367, 369 (1974).

Specifically, the ALJ in this case either disregarded or mischaracterized the following **material admitted or uncontested facts** that are conclusively established by testimonial or documentary evidence in the record.

- In November 2013, Kastens attempted to obtain letters from Frank Molina and Becky Ledbetter to the employer falsely representing that his absence from work was due to union activities. (Tr. 103:13-111:20, 128:22-132:9, 348:10-352:5; Jt. Ex. 2, Resp. Ex. 8)

- Molina came to Kastens's assistance by convincing management not to discharge Kastens for misconduct and to reduce his discipline to a three-day suspension in December 2013, which was after the point in time at which the ALJ concluded the Union's relationship with Kastens had become adverse. (Tr. 92:9-6, 95:6-10, 459:3-464:4; Jt. Ex. 4)

- Jarrod Lehman admitted that any animosity between Howard Johnson and him existed before Lehman ran for union office in 2013 and that any deterioration in their relationship took place before he ran an election campaign against Johnson. (Tr. 247:23-248:15)

- In two instances when the Company sought to discipline Kastens for poor job performance involving an incorrect drilling technique, Howard Johnson, as In-Plant Representative, intervened on Kastens's behalf and persuaded management not to make a disciplinary record of those performance deficiencies. (Tr. 301:14-302:25)

- Both Johnson and Ledbetter had close relationships with unit employees in the maintenance department because of their lengthy service in that department. (Tr. 340:21-341:18, 340:1-20)

- Many unit employees in the Maintenance Department contacted Howard Johnson and Becky Ledbetter to express their concerns over the dissemination of the security video. (Tr. 290:21-292:23, 335:9-337:8, 342:20-22, 387:25-389:15, 392:21-393:10)

- Johnson was not aware that Lehman or Kastens had originated the e-mail chain including the accident video when Johnson forwarded it to Jeff Black. (Tr. 292:11-23, 296:9-21)

- The employer obtained copies of social media comments and photographs posted by Lehman and Kastens before Jeff Clark met with Molina to address the matter, and Molina provided better quality copies of some of those documents during and after the meeting at Clark's request. Molina was not the Company's original source of the documents. (Tr. 61:16-64:7, 67:12-72:1; Jt. Ex. 17; GC Exhibits 11, 14)

- Kastens had four prior disciplinary actions in the twelve months prior to his misconduct relating to the accident video, which made his discharge automatic under Spirit policy. (Jt. Ex. 10 at 2-5, 14 at 7; Tr. 195:10-16, 519:1-17)

- All four of Kastens's previous disciplines were designated as closed and thus were included in his permanent disciplinary record. (Jt. Ex. 10 at 2-5; Tr. 505:8-22, 521:2-17)
- Kastens admitted that he did not need to provide any additional information to Molina during his investigation of his grievances because "he [Molina] had all the information he should have needed." (Tr. 577:10-21)

- Molina consulted with labor attorney Tom Hammond regarding Kastens's grievance. Hammond reviewed the case, determined that the Union would not succeed in arbitration, and advised Molina of his determination. Molina relied on Hammond's analysis and opinion. (Tr. 85:21-87:9, 96:23-97:23, 116:13-18, 186:17-187:8, 483:20-498:16)

- Molina alone made the decision not to arbitrate Kastens's grievances (Tr. 178:18-24, 298:25-299:12). Molina never discussed the handling of Kastens or Lehman's grievance with Howard Johnson, who had no influence over Molina's decisions regarding the processing of the grievances. (Tr. 299:13-19, 97:24-98:9)

- During negotiations with Spirit regarding the settlement of Kastens and Lehman's grievances, Molina first attempted to secure each individual's reinstatement, but the Company unequivocally refused. (Tr. 74:4-76:2, 99:14-102:3) Molina then sought a cash settlement of $50,000 for each grievant, which was also refused. Eventually, Molina negotiated the best financial settlements feasible – $5,000 for Lehman and $2,000 for Kastens. (Tr. 562:3-563:6; Jt. Exhibits 8, 16 at 3)

- Frank Molina, in his capacity as District 70 President, had diligently processed and won major grievances on behalf of other members who were political opponents. (Tr. 95:17-96:11).

- Kastens instigated the verbal confrontation with Howard Johnson on April 11, 2014. (Tr.

158:24-159:2, 307:5-7)

- Kastens posted comments on Facebook on May 1, 2015 threatening to inflict physical harm on Howard Johnson: "I would break his hip if it made it that far … I have my conceal carry." (Resp. Ex. 2; Tr. 193:21-194:17, 536:6-537:9)

The ALJ failed to give any consideration to these and other uncontested facts that are highly relevant to the General Counsel's allegations. Instead of relying on the evidence of record, the ALJ found statutory violations by constructing a version of disputed events derived from mere conjecture, speculation and unsupported assumptions. One example reveals the ALJ's determination to manipulate the record to support his desired findings. The ALJ stated that, "I have no doubt that Molina conveyed [Kastens's complaint about Howard Johnson's behavior toward Karen Ascension] to Howard Johnson," even though there is no evidence whatsoever that any such communication ever occurred. (ALJD 5 n.25)

The ALJ's material fact findings are clearly erroneous and mischaracterize the state of the record. Accordingly, the Board should reject these findings.

II. The Duty of Fair Representation Encompasses a Wide Range of Reasonableness

As the exclusive bargaining representative of all employees covered by its collective bargaining agreement, a labor union owes a duty to represent each unit employee fairly and in good faith. As the U.S. Supreme Court explained in the seminal case of *Vaca v. Sipes*: "The exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." 386 U.S. 171, 177 (1967). *Accord Boilermakers Local 202 (Henders Boiler and Tank Company),* 300 NLRB 28 (1990).

The burden to prove a breach of the duty of fair representation, and thus a violation of

Section 8(b), is quite demanding. A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca,* 386 U.S. 171, 190 (1967); *see also Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991) (recognizing that this standard applies to all union activity). In duty of fair representation cases, the Board generally gives significant deference to the decisions made by unions and their representatives, as "unions must be allowed a 'wide range of reasonableness' in serving their constituencies, including grievance handling." *Amalgamated Transit Union Div. 822 & German Trujillo, an Individual*, 305 NLRB 946, 953 (1991) (internal citations omitted).

III. The ALJ Erred in Finding That the Union Violated Sections 8(b)(1)(A) and (2) by Attempting to Cause and Causing the Company to Discharge Kastens and Lehman Because of Their Union Activity

Section 8(b)(1)(A) of the Act provides that it shall be an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed in Section 7. 29 U.S.C. § 158(b)(1)(A). And Section 8(b)(2) provides in relevant part that it shall be an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3). *Id.* § 158(b)(2).

The Board noted in *Good Samaritan Med. Ctr.*, 361 NLRB No. 145 at *2 (Dec. 16, 2014), that in cases involving allegations that a union violated the Act by causing an employee to be discharged, the Board has applied either a duty of fair representation framework or the burden-shifting framework established in *Wright Line*, 251 NLRB 1083 (1980). Under the former standard, "[w]hen a union prevents an employee from being hired or causes an employee's discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer -- or, if you please, adopt a presumption that -- the effect of its action is to encourage union membership on the part of all employees who

have perceived that exercise of power." *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), *enf. denied on other grounds*, 555 F.2d 552 (6th Cir. 1977).

Such an inference is improper in the absence of proof of discriminatory purpose and where the union has presented a legitimate business justification for its actions. *See Glaziers Local Union 558 v. NLRB*, 787 F.2d 1406, 1414 (10th Cir. 1986). And any inference is rebutted "by evidence of a compelling and overriding character showing that the conduct complained of was referable to other considerations, lawful in themselves, and wholly unrelated to the exercise of protected employee rights or other matters with which the Act is concerned." *Carpenters Local 1102 (Planet Corp.)*, 144 NLRB 798, 800 (1963). Such considerations include instances where the facts show the union action was necessary to the effective performance of its function of representing its constituency. *Operating Engineers Local 18*, 204 NLRB at 681.

Under the *Wright Line* analysis, the General Counsel must first establish that the employee's protected concerted activity was a "substantial or motivating factor" behind the union's adverse actions, which requires a showing of union animus and causation between the activity and the union's actions. *Ironworkers Local 340 (Consumers Energy Co.)*, 347 NLRB 578, 579 (2006). A prima facie case is rebutted by a showing that the union would have taken the same action even in the absence of the employee's protected activity. *Id.* [5]

[5] In this case, the General Counsel failed to prove a violation under either available framework. However, the *Wright Line* framework requires an actual analysis of causation between the protected activity and the union's actions, rather than allowing an ALJ to simply assume (as he did here) that because a union took some action and an employee was subsequently discharged, the union's action was unlawful. For this reason, the *Wright Line* framework is more appropriate. This is especially true in determining whether the General Counsel has made a prima facie showing of a violation. Here, the Union moved for dismissal of the amended complaint at the conclusion of the General Counsel's case-in-chief because the General Counsel failed to meet its burden under *Wright Line*. (ALJ Ex. 1) However, the ALJ reserved judgment on that motion. He then ruled against the Union in his decision based on evidence presented after the General Counsel rested its case, improperly denying the motion without analysis or discussion. (ALJD 16 n.67) The ALJ's unsupported, outcome-determined reasoning illustrates a general disregard for Board precedent.

A. The Union Did Not Cause or Attempt to Cause Kastens and Lehman to be Discharged

In this case, the ALJ conflated the two standards without addressing which standard he should apply. (ALJD 13:18-39) He then failed to apply either framework and concluded a violation occurred through inferences and assumptions unsupported by any evidence. Under either standard, it must initially be shown that the Union actually took some action which could constitute an attempt to cause the employer to discharge Kastens and Lehman. The ALJ relied solely on the fact that Howard Johnson hurriedly forwarded an e-mail he had received from Becky Ledbetter to Labor Relations Manager Jeff Black as evidence that the Union took such adverse action. (ALJD 13:41-45, 14:31-37) There is no evidence that Johnson acted with any sinister or illegitimate motive. In the e-mail, Johnson asked Black the following:

> We were told that this video shouldn't have been released….im getting calls about this, people are forwarding this message internally as well as outside spirit. What is the deal with this video?

(GC Ex. 8 at 2) Johnson asked only why the video had been circulating in the plant. He made no reference to either Kastens or Lehman, and he made no request for an investigation or discipline regarding those individuals. He testified credibly he was not aware that Lehman and Kastens had originated the lengthy e-mail chain when he forwarded it to Black. (Tr. 292:11-23, 296:9-21) This testimony was not controverted. Nevertheless, the ALJ characterized the e-mail as an attempt by the Union to get Kastens and Lehman fired by couching his conclusion in terms of credibility: "Johnson's testimony, that he did not review the e-mail and video attachment to ascertain that it originated with Lehman and was forwarded by Kastens, was utterly incredible." (ALJD 6 n.33) The Board should not give any deference to the ALJ's determination because it goes against the totality of the evidence. The ALJ acknowledged that "[f]rom whom Lehman got the security department video was never established" (ALJD 5 n.27); and both Lehman and

Kastens testified that neither person ascertained the source of the e-mail before forwarding the e-mail. (GC Ex. 2; Tr. 249:16-19) It is unreasonable for the ALJ to assume that Johnson must have investigated the lengthy e-mail chain to determine its original source before forwarding it to only one other person, but to accept without question that neither Lehman nor Kastens determined its source before forwarding it to a total of to 80 employees and non-employees. (GC Ex. 8)[6]

As discussed below, Johnson was worried about stopping further circulation of the video as requested by a number of unit employees. Without being aware of the video's source, Johnson surely was not attempting to cause the employer to discipline Lehman and Kastens. And even if he acted carelessly by failing to fully investigate the e-mail chain to determine its original source, "[m]ere negligence does not constitute a breach of the duty of fair representation." *Letter Carriers Branch 6070,* (*Postal Service*), 316 NLRB 235, 236 (1995).

B. The General Counsel Failed to Establish that Johnson Forwarded the Security Video Because of the Charging Parties' Union Activities

The ALJ's conclusion that the Union sought to cause disciplinary action to be imposed against Kastens and Lehman when Johnson forwarded the video is not supported by any credible evidence. Moreover, the General Counsel failed to show the necessary causation and animus to prove that the Union sought to have the Charging Parties discharged because of their protected activity. In finding that the Charging Parties were involved in protected activities, the ALJ relied on Lehman's campaign against Howard Johnson in a local union election in June 2013 and Kastens's support of opposition candidates in the International Union's 2014. (ALJD 4:9-15, 5:15-28) Opposition to incumbent union officials qualifies as protected activity. *See, e.g., Sheet Metal Workers Local 16 (Parker Sheet Metal)*, 275 NLRB 867 (1985). However, the mere fact that the Charging Parties were engaged in protected activity at some point does not prove,

[6] At a minimum, this inconsistency seriously damages the credibility of the testimony of the Charging Parties, which is the only evidence that even arguably supports the ALJ's conclusions.

without more, that the Union sought to cause the employer to discharge them.

1. Jarrod Lehman

Regarding Jarrod Lehman, the General Counsel offered no evidence to link Lehman's election challenge to Howard Johnson's e-mail. The ALJ noted that from 2008 until 2011, the relationship between Lehman and Johnson was "fairly contentious" when they worked together as representatives of Local 839. (ALJD 4:7-9) Thus, Lehman admitted that any difficulties in his relationship with Johnson existed before he ran for union office in 2013. (Tr. 247:23-248:15) This in no way supports a finding that the 2013 election – which was not closely contested – led to Johnson harboring ill will against Lehman seven months later. (Tr. 236:20-24) This finding has no support in the record. Indeed, Frank Molina testified credibly that Johnson actually helped Lehman reclaim his union position back after the election had concluded. (Tr. 103:1-7)

Due to this lack of direct evidence that Johnson took any action against Lehman based on his union activity, the ALJ attempted to bolster his unfounded inference of animus by stating that Molina was "complicit" with the employer regarding Lehman's "selfie photographs" during Spirit's investigation of Lehman (after the e-mails were forwarded and Lehman was suspended), which the ALJ claimed supported a finding of Union animus against Lehman. (ALJD 9 n.55, 14:2-4)[7] The ALJ accepted Counsel for the General Counsel's misrepresentation of the facts in this respect despite a dearth of evidence of complicity on the part of Molina and the company.

The General Counsel asserted that a string of e-mails proved Molina had provided incriminating evidence against Lehman to the employer.[8] But as Molina testified, this exchange

[7] The ALJ did not hold that these purported actions constituted violations of the Act in themselves; rather, he cited them as additional evidence of union animus. (ALJD 14:1-4)

[8] The evidence relevant to this murky allegation is included entirely in GC Ex. 14, a one-page chain of e-mails between Molina and Jeff Clark in February 2014. In that exchange, Molina first forwarded to Clark a message titled *Facebook* which he received from Lynne Strickland. Clark then responded that he had shredded his hard copies of images that were presumably attached to Molina's e-mail before realizing that not all the images he had requested were included, and he asked for an electronic version of "the selfie from the shop." Clark subsequently sent another

took place after he met with Clark during the Company's investigation of Lehman and Kastens and during the Union's grievance investigations. (Tr. 67:5-69:19) At that time, Clark already possessed a hard copy of these images and messages that the Charging Parties had posted to Facebook, which Molina had also reviewed during his own investigation. (Tr. 69:13-19) Clark observed during the meeting that Molina had better quality copies of the same images and asked the Union official to provide better copies to him, including the photo Lehman had taken of himself on the shop floor. (Tr. 69:13-19; GC Ex. 11)

As shown by Molina's testimony, he did not provide new evidence against Lehman, and he did not conspire with the Company against Lehman. Molina's explanation of these events was not contested.[9] Further, after Lehman's grievance was finally settled, Lehman thanked Molina for his diligent work, and Molina encouraged Lehman to run for political office. (Tr. 267:10-268:1) None of this undisputed evidence suggests that Molina or any other Union official harbored an animus against Lehman, and there is certainly no evidence of any animosity toward Lehman related to Howard Johnson's conduct in forwarding the security video to Jeff Black.

2. Ryan Kastens

The evidence also does not support the ALJ's assumption that Kastens's support of opposition candidates beginning around November 2013 caused Johnson to forward the security video to Black. The General Counsel presented no evidence that Johnson knew when he forwarded the e-mail that Kastens opposed incumbent officials of the Grand Lodge leadership, or

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e-mail to Molina requesting the same document. It was not clear whether Molina ever actually sent the "selfie" which Clark requested. (GC Ex. 14)

[9] Counsel for the General Counsel failed to call Jeff Clark to testify regarding this exchange despite the fact that the General Counsel carried the burden of proving Union animus. The Union properly requested that the ALJ draw an inference that Clark's testimony would have corroborated Molina's explanation based on the General Counsel's failure to call Clark. *See Advocate South Suburban Hospital v NLRB*, 468 F.3d 1038, 1048 and n.8 (7th Cir. 2006). However, not only did the ALJ fail to address this request for a negative inference against the General Counsel, the ALJ actually drew a negative inference against the Union because Respondents did not call Clark to testify. (ALJD 9 n.55)

that this opposition led Johnson to harbor an animus against the Charging Party.

In this connection, Kastens testified that he attended a Local Lodge 839 meeting in November 2013 at which opposition candidate Karen Ascension appeared. (Tr. 154:2-155:4) Kastens claimed that he was instructed to ask Johnson to leave the meeting because he was shouting at Ascension, but Kastens never indicated he supported Ascension during or after the meeting. (Tr. 155:3-8) The ALJ mischaracterized this testimony by stating that Kastens "accompanied Karen Ascension" to the meeting. (ALJD 5:16) Then, without any factual basis, the ALJ leapt to the conclusion that "[b]ased on their subsequent actions toward Kastens, I have no doubt that Molina conveyed [Kastens's complaint about Johnson's behavior toward Ascension] to Howard Johnson." (ALJD 5 n.25) This outcome-driven assertion does not accurately reflect the state of the record.

Even if it were assumed that Johnson had knowledge of Kastens's political views in January 2014, he testified that he did not hold any animosity toward Kastens at that time. (Tr. 309:8-10) In two instances when Spirit sought to discipline Kastens for poor job performance involving an incorrect drilling technique, Johnson, as In-Plant Representative, intervened on Kastens's behalf and persuaded management not to make a disciplinary record of those job failures. (Tr. 301:14-302:25) The ALJ noted that Johnson's role in these matters was not disputed (ALJD 5:3-5, n.23), yet he gave no weight whatsoever to these actions.

The ALJ again attempted to infer a Union animus against the Charging Party by mischaracterizing other evidence and entirely ignoring important testimony. The ALJ stated that "[b]y December 2013, Molina and Kastens argued over the latter's criticism of District 70's organizing policies and support for the International slate of [so-called] reform candidates" and incorrectly proclaimed that Molina did not deny criticizing Kastens over his support for the

opposition slate. (ALJD 5:24-28, n.26) The hearing transcript establishes otherwise:

> Q Okay. Did you ever send any text messages to Ryan Kastens about political - Union political activities?
> A No.
> Q Okay. Or emails?
> A No, never any emails like that.
> Q Okay. Did you ever make any sort of warnings to Ryan Kastens of any sort to the effect that he should not be supporting a particular political candidate in the election?
> A No.

(Tr. 559:3-12) The ALJ's conclusion is based entirely on Kastens's self-serving testimony. Kastens claimed that Molina sent him text messages criticizing his support of reform candidates, but Kastens could not produce a single text message. (Tr. 155:21-157:2) The ALJ had no reasonable basis to conclude that Molina had any ill will or malice toward Kastens.

Instead, the uncontested evidence shows that in December 2013, when Molina was already aware that Kastens supported Jay Cronk, he still went to great lengths to convince Robin Ketterman, Kastens's supervisor, not to discharge Kastens for his fourth disciplinary violation and to reduce the discipline to a three-day suspension. (Tr. 462:25-464:4, 94:18-95:14) Kastens's union activity clearly did not influence Molina's efforts to represent him. And Molina also personally handled and won substantial grievance settlements on behalf of other members who supported Cronk during that time period, showing that he acted in good faith in his representative capacity on behalf of all unit employees and that a member's political views was not a factor in Molina's decision making. (Tr. 95:17-96:14)

Finally, the ALJ cited as evidence of animus and causation an e-mail sent from Becky Ledbetter to Jeff Clark on January 13, 2014 in which she asked, "Could you have keystrokes on Ryan Kastons [sic] pulled for me ASAP? Thank you." (ALJD 6:4-5; GC Ex. 23) Ledbetter could not recall the context of this e-mail. (Tr. 380:4-18) But the plain text of this e-mail reflects that

Ledbetter asked Clark to retrieve records of Kastens's e-mails for her official purposes, not for management to investigate Kastens's computer usage as the ALJ concluded. (ALJD 6:4-5) Counsel for the General Counsel failed to call Clark to testify regarding the context of this e-mail, and the ALJ should have drawn an inference that Clark's testimony would not support the General Counsel's interpretation of the e-mail (which conflicts with the plain meaning of the document), but the ALJ refused to do so.[10] The ALJ's findings of Union animus against Kastens are based on speculation and unsupported assumptions and thus should be rejected.

C. The Union Rebutted Any Purported Prima Facie Showing or Presumption of a Violation

Even if the General Counsel had established a prima facie case of a violation of Section 8(b)(A)(1) or (2) under either standard, Respondents unequivocally rebutted the prima facie case (as well as any presumption of a violation) by showing that the Union's actions were motivated by a legitimate membership interest, and it would have taken the same actions even if the Charging Parties had not engaged in any protected activity.

As a preliminary matter, Howard Johnson was not aware that Kastens or Lehman had been involved in circulating the video when he forwarded it to Jeff Black, so there is no question that he would have taken this action without regard to whether the Charging Parties took part in any union activity. (Tr. 292: 11-23; Tr. 296:9-21) The evidence also demonstrates that the Union contacted management and requested that the accident video be removed from the shop floor to address the concerns of numerous maintenance employees who had contacted Ledbetter and Johnson. The Union would have taken the same actions whether or not the persons responsible for circulating the security video had engaged in dissident union activity.

[10] In fact, the ALJ relied on this mischaracterization of the evidence to fashion an inconsistency in Ledbetter's testimony, which he claimed "significantly diminished" her credibility. (ALJD 6 n.30) The ALJ then relied upon this contrived conclusion – disguised as a credibility determination -- to reject nearly all of Ledbetter's testimony. (ALJD 6 n.30-32, 11 n.62, 4 n.21)

It is axiomatic that a labor organization has a statutory duty to fairly represent all employees in its bargaining unit. *Vaca*, 386 U.S. at 177. In *O'Neill v. Airline Pilots Ass'n, Int'l*, the Fifth Circuit explained that because a union must consider the interests of all employees in a unit rather than a select few, it is inevitable that some employees may not benefit when the entire unit, or a large number of employees, benefits. 939 F.2d 1199, 1204 (5th Cir. 1991). Decisions like this fall within the wide range of reasonableness afforded to a union, and therefore do not constitute violations of the duty of fair representation or the NLRA merely because some employees benefit and others do not. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

In this case, both Ledbetter and Johnson testified that they received numerous phone calls from maintenance employees who had viewed the video and wanted to know why it was being circulated because security videos had never been released previously to employees. (Tr. 335:17-24; 290:21-291:3) Unit employee Reginald Maloney reached out to Ledbetter because he was concerned that a video of a previous accident which involved him while he driving a Spirit scooter would also be widely circulated in Spirit's e-mail system. (Tr. 392:21-393:9)[11] The Union had a duty to protect Maloney and other maintenance employees from embarrassment and other adverse consequences resulting from widespread disclosure of accidents or the poor use of equipment shown in surveillance videos. In the exercise of reasonable discretion, Ledbetter and Johnson took steps to ensure that circulation of the confidential video ceased. These steps certainly protected a large number of unit employees from disciplinary action.

The immediate objective of both Johnson and Ledbetter was to remove the security video from computers on the shop floor because of the concerns expressed by unit employees. (Tr.

[11] The ALJ concluded that Maloney "was not motivated by concern, but other considerations when he communicated with Ledbetter" (ALJD 6 n.32), completely ignoring Maloney's testimony that he contacted Ledbetter because he was concerned that the video of his own accident would also be disseminated on Spirit's servers. (Tr. 392:21-393:10)

290:21-292:3, 338:6-9, 343:2-23) Their testimony was uncontroverted and was clear, direct and unequivocal; yet the ALJ disregarded it entirely without reasonable justification, concluding that no "plausible bargaining unit interest [was] articulated." (ALJD 13:43-44)[12] But as the record reflects, when Johnson forwarded the accident video to Black, he was taking action to effectively represent the interests of his constituency. The ALJ erred in failing to find that the Union rebutted any prima facie showing of a violation of the Act.

D. The Employer Would Have Discharged Kastens and Lehman in the Absence of Any Union Action

Further, the magnitude of the Charging Parties' violations of Spirit's internet and e-mail policies mandated a finding that the employer would inevitably have discovered the e-mails and investigated both Lehman and Kastens under any circumstances. Lehman forwarded the accident video to nine different e-mail addresses, and Kastens forwarded the video to approximately 71 separate e-mail addresses. (GC Ex. 8 at 3-6; Tr. 194:20-195:6) It is, of course, highly probable that recipients who were not employees of Spirit forwarded the e-mail and video to many other individuals. As Reggie Maloney testified, he viewed the video on Spirit computers in multiple locations in the plant even though neither Lehman nor Kastens had forwarded the video to him, which shows that the video was immediately disseminated to many others than the recipients selected by Kastens and Lehman. (Tr. 386:18-387:24, 388:15-389:1; GC Ex. 8 at 3-6)

Due to the severity of the Charging Parties' egregious violations of company policy and the public nature of the video's disclosure, Spirit management certainly would have become

[12] The reason given by the ALJ for discrediting the Union witnesses' testimony regarding unit employees' inquiries about the accident video was that "it is hard to imagine why employees would express concern about [the accident video] to [Howard Johnson] instead of a Company supervisor or manager." (ALJD 13:41-43) But the Union provided ample evidence that Johnson and Ledbetter had close relationships with employees in the Maintenance Department based on their long careers in that department. (Tr. 340:1-341:18) The ALJ's statement suggests speciously that the maintenance employees who had kept a close working relationship and friendship with Johnson for many years would have naturally forwarded their concerns to management first rather than to their trusted Union representative. The ALJ's rejection of the Union witnesses' testimony defies logic, and it directly conflicts with the ALJ's conclusion that it was improper for Johnson to express his own concerns to management.

aware that the video had been disclosed and circulated at some point on or soon after January 27, 2014. Further, the General Counsel failed to show that Howard Johnson's inquiry was Spirit's first knowledge of the e-mail chain and video. There is no question that the Company would have soon discovered the e-mail chain initiated by Lehman and Kastens, performed an investigation, and eventually discharged both Charging Parties absent any Union action.

After finding that the Union caused Kastens and Lehman to be discharged, the ALJ ordered that the Union make them whole with back pay. (ALJD 17:30-34)[13] Because Spirit would have inevitably discharged Kastens and Lehman absent any action on the part of Johnson, an award of back pay would be a windfall to the Charging Parties and therefore inappropriate, as it would be clearly at odds with the remedial aims of the Act. *Local 60, United Brotherhood of Carpenters v. NLRB,* 365 U.S. 651, 655 (1961).

E. The Union Did Not Cause or Attempt to Cause Spirit to Discriminate Against the Charging Parties in Violation of Section 8(a)(3)

A violation of Section 8(b)(2) cannot be found unless the Union caused or attempted to cause the employer to discriminate against the Charging Parties in violation of Section 8(a)(3). 29 U.S.C. § 158(b)(2). A union does not violate 8(b)(2) unless the "discrimination" which it seeks would constitute a violation of Section 8(a)(3) if the employer acted without suggestion or compulsion. *NLRB v. Local 50, Am. Bakery & Confectionery Workers Union, AFL-CIO*, 339 F.2d 324, 327 (2d Cir. 1964) (*cert. denied*). *See also Palmer House Hilton*, 353 NLRB 851, 860 (2009).

In this case, even if the Union had made a request that Spirit investigate or discipline the Charging Parties for circulating the security video – which was not proven by the General

[13] The ALJ improperly added this back pay remedy after the decision issued under the guise of errata, which substantively changed his decision. The Board should strike this errata and back pay remedy. *Wilco Bus. Forms*, 280 NLRB 1336, 1337 n.2 (1986).

Counsel – this would not constitute an attempt to cause the Company to discriminate against the employees in violation of the Act. Indeed, the Board had already determined that Spirit did not violate Section 8(a)(3) when it investigated, suspended and discharged Kastens. (Resp. Ex. 14; Tr. 542:22-543:3, 543:6-10) That would be the case whether or not the Company acted on the request or suggestion of the Union. The actions allegedly sought by the Union cannot form the basis of a Section 8(b)(2) violation.

The ALJ rejected this conclusion, stating that it is flawed in that "it presumes that an employer acts as a neutral conduit in conveying a union's desired actions." (ALJD 14:6-16) The ALJ thus held that a union can cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) by causing or attempting to cause an employer to take action that could not possibly violate Section 8(a)(3). This reading of the law is erroneous, as it contravenes well established Board precedent as well as the plain language of the Act.

IV. The ALJ Erred in Finding That the Union Violated Section 8(b)(1)(A) by Threatening to Cause Bodily Harm to Kastens and to Impede His Efforts to Obtain Reinstatement Because of His Union Activity

The ALJ held that the Union violated Section 8(b)(1)(A) through "the threats by Howard Johnson, a statutory agent, to cause Kastens bodily harm and impede his grievance processing and efforts to be reinstated by the Company." (ALJD 13:5-7) In this connection, the Board has held that threats of physical violence by union agents against members or employees can be coercive within the meaning of Section 8(b)(1)(A) and are therefore prohibited by the Act. *Food & Commercial Workers Local 7R (Longmont Foods*), 347 NLRB 1016 (2006). However, such threats constitute a statutory violation only if they are in response to or otherwise related to an employee who is exercising his rights under Section 7. *See, e.g., Oil Workers Local 2-947 (Cotter Corp.),* 270 NLRB 1311 (1984) (the employee's "reference to filing a new charge

provoked [union official] Wilkins into threatening him with physical violence . . . Accordingly, we find that the Respondent violated Section 8(b)(1)(A) of the Act by engaging in such conduct."); *In re Local 446, Int'l Bhd. of Painters & Allied Trades, AFL-CIO*, 332 NLRB 445, 446 (2000) (threats of economic reprisals and physical violence by union against employee are proscribed when those threats are made because of the employee's protected challenges to incumbent union leadership). Therefore, in order to prove a prima facie violation of Section 8(b)(1)(A) based on threats allegedly made by Johnson against Kastens, the General Counsel had to present evidence showing that (1) threats were actually made and (2) they were in response to, provoked by or otherwise directly related to Kastens's protected activity, thereby showing the requisite causation and animus against the Charging Party. The General Counsel failed to prove either prong here, and the ALJ erred in finding a violation of the Act.

A. The General Counsel Failed to Prove That Johnson Threatened Kastens

The General Counsel did not satisfy his burden of proving by a preponderance of the evidence that any threat was made against Kastens. There is no probative documentary evidence reflecting a threat of violence or a threat to discriminatorily process Kastens's grievances. The only purported evidence of any threat is the self-serving testimony of Kastens and Jay Cronk. (Tr. 159:3-8, 210:2-10) The ALJ apparently credited this testimony and discredited all of the Union's contradictory testimony. However, such a finding is clearly incorrect based on the totality of the evidence.

Kastens is an interested party who is motivated by his desire to replace Johnson in his Union position, hostility against Johnson, and by a desire for financial gain in this proceeding. (Tr. 535:1-8; Resp. Ex. 2). Cronk's testimony similarly should not have been credited. Cronk was embittered by his failed campaign for election to International President, and because the

Grand Lodge had discharged him for gross misconduct, which an arbitrator upheld in an award issued prior to the hearing in this case (Tr. 213:8-214:21), so he was clearly motivated by a desire for revenge against the Union. He also directly contradicted Kastens's testimony on a key fact, claiming that they were never removed from the premises by security personnel, which even Kastens had previously admitted. *Compare* Tr. 160:4-10, 188:4-7 *with* Tr. 210:18-211:9.

Additionally, Counsel for the General Counsel failed to call any neutral witnesses, including any Spirit management or security witnesses, to testify as to what they observed of the exchange between Kastens and Johnson even though the incident occurred in a crowded area through which hundreds of Spirit employees passed at the time in question.[14]

Contrary to the ALJ's conclusion, the weight of the credible evidence supports a finding that no threats were made against Kastens. The Union presented six credible witnesses who refuted Kastens's claim. All six witnesses testified that Kastens instigated the verbal confrontation and attempted to provoke Johnson; and all six stated that Johnson never threatened Kastens with bodily harm and never threatened to interfere with his employment rights. (Tr. 306:3-7, 404:7-13, 412:2-5, 422:8-10, 425:19-24, 446:13-17, 434:12-22) The ALJ refused to credit any of this testimony, based primarily on his view that Kastens would not have dared Johnson to hit him if Johnson had not first threatened to "beat Kastens's ass." But the ALJ's conjecture does not alter the facts, and the ALJ's view does not justify discrediting every Union witness.

Additionally, the ALJ abused his discretion when he admitted in evidence two irrelevant and prejudicial exhibits in evidence over the strenuous objections of Respondents' counsel. The ALJ admitted a Petition for Protection from Stalking Order filed by Kastens in a state court

[14] The ALJ ignored the Union's request for a negative inference against the General Counsel's argument based on this failure. *See Advocate South Suburban Hospital*, 468 F.3d at 1048 and n.8.

against Johnson in his individual capacity on April 14, 2014, in which Kastens wrote that Johnson "balled up his fist and threatened to 'beat my ass'" on April 11. (GC Ex. 4 at 2-4) The ALJ then admitted a Final Order of Protection from Stalking, purportedly entered May 1, 2014, which stated that Johnson was prohibited from being in close proximity to Kastens until May 1, 2015. (GC Ex. 5 at 1)

These two documents in no way supported the General Counsel's allegations that Johnson threatened to physically harm Kastens because of his union activity. First, Kastens's petition was filed against Johnson in his individual capacity, not against the Union; and there is no indication that it was ever served on Johnson. (GC Ex. 4) The restraining order indicated that Johnson did not appear for the hearing, so it is an ex parte ruling by a Kansas state judge. (GC Ex. 5) There is no indication that any investigation or fact-finding ever occurred before the final order was issued; instead, it appears that the entire order was based on Kastens's uncorroborated and self-serving allegations – just like the ALJ's decision.

These documents amounted to nothing more than a prior consistent statement by Kastens presented during the General Counsel's case-in-chief to support his testimony. As the Board has noted, "Federal Rules of Evidence, Sec. 801.4.2 permits admission of prior consistent statements only where there is an express or implied charge of recent fabrication, or improper influence or motive," and an offer of such a statement should be denied absent such impeachment. *Crown Bolt, Inc.,* 343 NLRB 776, 790, n.22 (2004).

The reckless and injudicious manner in which the ALJ ruled on evidentiary matters also violated the Union's due process rights. As the Fifth Circuit stated in a Title VII case, "[t]he perfunctory process employed in this case belittles our notion of fairness." *Edwards v. City of Houston,* 78 F.3d 983, 1003 (5th Cir. 1996) (Fifth Circuit overruled district court's evidentiary

rulings because perfunctory nature of rulings violated plaintiff's due process rights). The Union was not a party to the state court proceeding. These irrelevant, misleading and prejudicial documents should have been excluded summarily, especially since they were not certified as official copies by the state court. Nevertheless, the ALJ found that Kastens's application for a temporary restraining order "corroborates [his] testimony and goes to credibility." (Tr. 162:8-9) This outrageous evidentiary ruling and the ALJ's subsequent reliance on these documents illustrates the arbitrary and careless nature of the ALJ's decision-making process.

B. Any Alleged Threats Made by Johnson Were Caused by Kastens's Aggressive Conduct, and Not by Kastens's Union Activity

Assuming for the purpose of argument that the Board accepts the finding that Johnson threatened to physically harm Kastens, there was no violation of the Act because such threats were not made in response to or in any way related to any protected activity, and therefore the threats could not possibly coerce or restrain Kastens from exercising his Section 7 rights.

Violations of Section 8(b)(1)(A), including threats by union officials, require proof of causation – that is, that the charging party's protected activity was a substantial or motivating factor for the union's adverse actions against the charging party. *Ironworkers Local 340,* 347 NLRB at 579; *Oil Workers Local 2-947*, 270 NLRB 1311. Without some causal connection, such threats could not actually or theoretically restrain protected activity. In this case, the General Counsel's claim failed because the evidence does not show any causal connection whatsoever between Kastens's union activity and any threats allegedly made by Johnson. Johnson did not target Kastens and threaten him when he realized that Kastens was campaigning for an opposition candidate. Indeed, it was Kastens who marched across five lanes of traffic to confront Johnson. (Tr. 362:13-364:4, 361:12-15, 408:19-409:7) Kastens admitted that when he approached Johnson, "Howard [Johnson] hadn't even acknowledged me yet . . . I proceeded to

get his attention to tell him that he was in the wrong." (Tr. 158:24-159:2) Kastens indisputably initiated his exchange with Johnson. (Tr. 307:5-7)

From the outset, Kastens was on the offensive. After crossing the street and confronting Johnson, Kastens moved within inches of Johnson's face and began shouting, "Hit me! Hit me!" (Tr. 304:2-8, 306:24-307:4, 407:21-25, 421:10-13, 431:1-10) Kastens admitted that he attempted to provoke Johnson into striking him (Tr. 159:9-11), acting in a calculated manner with the intent to provoke a confrontation and a physical response from Johnson. Kastens testified that he "was upset and emotions took over" when he confronted Johnson. (Tr. 190:1) Thus, any statements which Johnson made in response to Kastens's outburst must be viewed in this context. The fact that Kastens had been engaged in protected activity earlier that day had nothing to do with Johnson's responsive statements when Kastens confronted him. Hence Kastens's protected activity was not a substantial or motivating factor with respect to Johnson's defensive reactions. But the ALJ disregarded the requirement of causation, or proof of a nexus between the alleged threats and alleged protected activity. (ALJD 12:33-44)

C. Johnson Was Not in a Position to Carry Out Any Threats Regarding the Processing of Kastens's Grievance

The Board has held that "threats directed at a member's employment status arising out of intra-union friction, if uttered by an official who is in a position to carry out the threats, are a violation of the Act." *Toledo World Terminals*, 289 NLRB 670, 703 (1988) (internal citations omitted). Here, the uncontroverted evidence establishes that Johnson was in no position to carry out any alleged threats regarding Kastens's reinstatement. Kastens's grievances were transferred to District 70 and were in the exclusive control of Frank Molina several weeks before April 11. (Jt. Ex. 5 at 3) By April 1, Tom Hammond, the Union's attorney, had already advised Molina to settle both grievances rather than proceed to arbitration. (Tr. 493:8-18, 495:5-497:20, 553:16-17)

Johnson never had any discussions with Molina or Hammond about the discharge grievances; and he never attempted to influence Molina's decisions in regard to the processing of the grievances. (Tr. 299:13-19, 507:14-18, 97:24-98:9)[15] This testimony was not rebutted, and the ALJ conceded that Johnson played no role whatsoever in the investigation or processing of Kastens's grievances. (ALJD 8 n.45; Tr. 298:19-24)[16]

Accordingly, even if Johnson had threatened to interfere with Kastens's employment rights or had threatened to discriminatorily process his grievances, he had no ability to follow through with such a threat. The ALJ ignored all of the uncontroverted evidence described above in order to find a non-existent violation of the Act. This utter disregard for the facts mandates the Board's rejection of the ALJ's findings with respect to Johnson's alleged threats against Kastens.

D. Kastens Lost the Protection of the Act

Further, even if Johnson did threaten to cause bodily injury to Kastens and to discriminatorily process his grievances, those actions would not constitute a statutory violation by the Union because Kastens lost the protection of the Act through his own misconduct and threats of violence. As the Board has explained: "An employee's protest of conduct (real, or in good faith perceived) by the officers of a labor organization is generally protected by the Act . . . That protection can be lost by conduct such as violence committed during the otherwise protected protest." *Teamster Local 413 (Refiners Transp.),* 316 NLRB 343, 350 (1995).

It is well established that "employees can lose the protection of the Act by conduct that fairly can be characterized as opprobrious or extreme." *U.S. Postal Serv.*, 251 NLRB 252 (1980).

[15] In fact, Howard Johnson has held the title of Organizer since March 2014, so by definition he was not involved in *any* grievance procedure in April 2014. (Tr. 288:3-17) The ALJ ignored this fact, stating that Local 839 presently assigns Johnson as its second shift In-Plant Representative. (ALJD 2:32-33)

[16] Inexplicably, despite the lack of any evidence suggesting discussions between Johnson and Molina about Kastens's grievance, the ALJ expressed "no doubt" that such discussions occurred, which allowed the ALJ to infer that Johnson could have indirectly influenced the grievance procedure. (ALJD 5 n.25)

This principle has been applied in numerous cases in which an employee's actions would usually be protected but subsequently lose their protection due to the employee's misconduct. *See, e.g., Clear Pine Mouldings,* 268 NLRB 1044, 1046 (1984); *In Re Am. Golf Corp.,* 330 NLRB 1238 (2000); *Douglas Autotech Corp.,* 357 NLRB No. 111 (Nov. 18, 2011).

In *Clear Pine Mouldings*, the Board held that actual violence, as opposed to verbal, is not necessary for an employee to lose protection of the Act and that "[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker." 268 NLRB at 1045-46. The *Clear Pine Mouldings* analysis is straightforward: an employee cannot prevail on an unfair labor practice charge based on an allegation that the employer discharged him for strike-related activities when the employee participated in misconduct that was violent, coercive or intimidating. The same rule applies to this case.[17] However, the AJD rejected the Union's argument in a single, cavalier sentence: "That argument also fails because I found that Kastens did not threaten Johnson." (ALJD 13:2-3) This statement in no way reflects the state of the evidence.

Regarding the events of April 11, 2014, seven witnesses, including Kastens, testified that the Charging Party attempted to provoke a violent reaction from Johnson, shouting "Hit me!" repeatedly and telling Johnson "to take his best shot." (Tr. 304:2-8, 306:24-307:4, 407:21-25, 421:10-13, 431:1-10) Kastens charged across five lanes of traffic, confronted Johnson, moved aggressively within inches of Johnson's face, and screamed at Johnson in an effort to intimidate and provoke him. (Tr. 362:13-364:4, 361:12-15, 408:19-409:7, Resp. Ex. 13)

On May 1, 2014, Kastens publicly threatened Johnson in his Facebook posts. (Tr. 193:21-194:11) Kastens threatened to break Johnson's hip and referenced his concealed handgun

[17] The ALJ appears to have at least acknowledged that a party can potentially lose protection of the Act through threats of violence or similar misconduct. (ALJD 12:46-13:3)

license, suggesting that he would shoot Johnson: "I would break his [Johnson's] hip it if made it that far . . . I have my conceal carry. I'm not worried about him." (Resp. Ex. 2) The ALJ found that this "posting was not meant by Kastens as a threat, as the Union suggests, but rather an attempt to publicize his latest gain in the effort to oust Howard Johnson from his union position." (ALJD 11 n.65) The ALJ's reasoning in this respect would shock the conscience and strain the credulity of any reasonable person.

On these two occasions, Kastens's verbal and nonverbal efforts to provoke a violent confrontation were reprehensible. Kastens cannot now prevail on a claim that his statutory rights were violated because he lost the protection of the Act by reason of his own misconduct.

V. The ALJ Erred in Finding That the Union Violated Section 8(b)(1)(A) by Discriminatorily or Arbitrarily Processing Kastens's Grievance

The ALJ also erred when he found that the Union violated its duty of fair representation and thus violated Section 8(b)(1)(A) by processing Kastens's grievance in a discriminatory or arbitrary manner. (ALJD 16:33-34) In *Letter Carriers Branch 6070*, (*Postal Service*), 316 NLRB 235, 236 (1995) (internal citations omitted), the Board explained:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. And any substantive examination of a union's performance must be highly deferential. Thus, mere negligence does not constitute a breach of the duty of fair representation. A union's conduct is arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness" as to be irrational.

As the duty relates to a labor organization's processing of grievances, the union may not completely ignore a meritorious grievance or process the grievance in a perfunctory, bad-faith fashion. *Vaca*, 386 U.S. at 191. No employee, however, has an absolute right to have his

grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. *Id*. "[I]t is settled law that a union need not expend time and resources pursuing a grievance that is clearly frivolous." *Bottle Blowers Local No. 106,* 240 NLRB 324 (1979). Moreover, a union need not be correct in its substantive analysis if it decides not to arbitrate a grievance; it need only act reasonably. *Air Line Pilots Ass'n, Int'l v. O'Neill,* 499 U.S. at 67.

Here, the ALJ concluded that the Union processed Kastens's grievances discriminatorily or arbitrarily (ALJD 16:16-17) But the ALJ has ignored the fact that Kastens's grievance lacked any merit. He has also ignored the fact that the Union conducted a thorough investigation into the matter, and when Molina reasonably concluded that the Union would not prevail at arbitration, he negotiated the best possible settlement possible. The Union did not act arbitrarily or discriminatorily.

It is apparent that the only reason why a Complaint was issued relating to the Union's processing of Kastens's grievance, and why the ALJ found a violation of the Act here, is that Kastens vocally opposed settling his grievance and was dissatisfied with the Union's decision. The ALJ cited Kastens's unhappiness with the grievance settlement numerous times in deciding that the Union violated Section 8(b)(1)(A).[18]

Significantly, the General Counsel did not allege, and the ALJ did not find, any violation of the Act relating to the processing of Lehman's suspension and discharge grievance, and no evidence was offered to support such an allegation. Indeed, Lehman expressed his gratitude to Molina for his efforts in settling his discharge grievance. (Tr. 555:23-556:21, 556:23-24, 267:18-20) As the ALJ noted, Lehman had no disciplinary record prior to his violation of Company

[18] *See, e.g.,* ALJD 10:9 ("Kastens disagreed, asserting that it was not a last chance agreement."); ALJD 10:10-11 ("Kastens expressed disappointment with that result and hung up the telephone."); ALJD 15:28-29 ("Kastens informed Molina of his disagreement and insisted he take [Kastens's grievance] to arbitration."); ALJD 15:31-32 ("Kastens expressed disappointment with the settlement, rejected the notion that he was saddled by a 'last chance agreement' and hung up the telephone.").

policies relating to the dissemination of the accident video whereas Kastens had "racked up a significant disciplinary history." (ALJD 4:4, 22-23) For this reason, Tom Hammond, the labor attorney consulted by Molina, stated while "Kastens' case was certainly the easier of the two," the Union would not succeed in arbitration in either case. (Tr. 495:11-496:23)

Whereas Lehman accepted the Union's reasoned and good faith decision to settle, Kastens – whose grievance clearly lacked merit – loudly protested. But because employees have no absolute right to arbitration, and because employee consent is not necessary for a union to bind the employee to the terms of a grievance settlement, *Postal Service,* 300 NLRB 196 n.11 (1990), a grievant's unhappiness with the Union's decision is immaterial to the question of fair representation. See *Johnson v. United Steelworkers of Am., Dist. 7, Local Union No. 2378-B,* 843 F. Supp. 944, 948 (M.D. Pa. 1994) *aff'd,* 37 F.3d 1487 (3d Cir. 1994). In this case, the ALJ erroneously relied on Kastens's disagreement with the settlement in finding a statutory violation.

A. The Union's Processing of Kastens's Grievance Was Not Arbitrary

The uncontested facts reflect that the Union was thorough in its investigation and processing of Kastens's grievance, but the grievance was without merit. The ALJ ignored all of the evidence, however, and concluded that the Union acted arbitrarily because the Union did not communicate frequently with Kastens during the process, and the Union mischaracterized a past discipline as a last chance agreement. (ALJD 15:12-32, 16:1-5) These findings are plainly unsupported by any credible evidence.

1. The Union Fairly Investigated and Processed Kastens's Grievance

The evidence shows that the Union conducted a thorough investigation of Kastens's grievances before deciding not to proceed to arbitration. In-Plant Representative Tim Johnson handled the grievances at the outset of the process. He attended the Company's investigative

interviews and prepared thorough notes at Molina's direction. (Tr. 567:8-16, 551:22-25, 561:18-562:2) Kastens testified that he never expressed any concern about Johnson's investigation of his grievance. (Tr. 578:7-9) Instead, he thanked Johnson for his efforts. (Tr. 544:18-545:1)

When Johnson could not resolve the grievances, he sent a formal referral letter to Molina, who then stepped in to handle the investigation. (Tr. 567:8-18, 544:12-545:6; Jt. Ex. 5 at 3) Molina followed his standard procedures by discussing the status of the grievances with Johnson (Tr. 552:18-21; 551:1-9); interviewing Kastens (Tr. 568:9-23, 575:4-11); and gathering all available documents and information before sending information requests regarding Kastens to Jeff Clark, Director of Labor Relations. The Company responded by providing additional documents and information to Molina. (GC Ex. 7; Tr. 39:16-40:6, 548:9-549:3)

Molina then consulted Tom Hammond who reviewed all relevant documents and then advised him that the Union would not prevail in arbitration. (Tr. 85:21-87:9, 96:23-97:23, 116:13-18, 186:17-187:8, 483:20-498:16) Molina also performed extensive research of past arbitration awards to determine whether the grievances had any chance of success, but none of the past awards supported Kastens's grievance. (Tr. 555:1-554:25; Resp. Ex. 11) Molina gave ample consideration to the merits of Kastens's grievances before attempting to settle them. He also considered the substantial arbitration costs relative to the potential for success, stating that "I'm the steward over the Machinists' Union in Kansas and their money, and I've got to make that decision whether to spend the money on arbitration." (Tr. 554:20-25) These are valid factors that should be considered before any decision to arbitrate is made. *See Thompson v. Aluminum Co. of America*, 276 F.3d 651, 658 (4th Cir. 2002). This deliberate process far exceeded the "minimal investigation of grievances brought to its attention" necessary for a union to satisfy its duty of fair representation. *Stevens v. Moore Bus. Forms, Inc.*, 18 F.3d 1443, 1446 (9th Cir. 1994).

After deciding not to arbitrate the discharge grievance, Molina also acted diligently in trying to obtain the best possible settlement for Kastens. He first proposed reinstatement and finally was forced to accept a $2,000 payment. Kastens accepted and cashed the employer's check. (Tr. 562:3-13, 563:2-6, 562:12-563:1; Jt. Ex. 8) None of these facts relating to the Union's investigation and processing of Kastens's grievance were controverted. But the ALJ ignored the fact that the Union followed all standard protocols and worked diligently on behalf of Kastens, instead concluding that "its processing of Kastens' claim in such a perfunctory manner was clearly arbitrary." (ALJD 15:14-15)

2. The Union Communicated Sufficiently With Kastens

In the ALJ's analysis of the Union's processing of Kastens's grievance, the main focus is on the Union's purported "failure to either communicate extensively with or to obtain a statement from Kastens during the grievance process." (ALJD 15:12-25) The ALJ correctly notes that such a failure is not dispositive. (ALJD 15:13) He nonetheless relied on this alleged failure to communicate in finding that the processing of Kastens's grievance was so perfunctory as to be clearly arbitrary. (ALJD 15:14-15)

It is well established that merely failing to communicate with a grievant during the grievance process, or failing to interview a grievant, does not mandate a finding that the union acted arbitrarily. *See, e.g., Asbestos Workers Local 17* (*Catalytic, Inc*.), 264 NLRB 735 (1982) (union lawfully agreed to discharges of grievants after reviewing the work alleged to be substandard and their attendance records without interviewing grievants or obtaining their side of the story); *Plumbers Local 195 (Stone & Webster Engineering Corp.)*, 240 NLRB 504 (1979) (union lawfully relied on statements provided by employer witnesses, which were corroborated by objective evidence, in dismissing grievance); *Pac. Mar. Ass'n*, 321 NLRB 822, 823 (1996).

In this case, the evidence adduced at hearing demonstrated that Molina did communicate with Kastens throughout the grievance process. (Tr. 543:14-544:8, 147:15-18, 147:19-148:14, 553:16-25) And in any event, it was unnecessary for the Union to conduct further interviews with Kastens. As Kastens admitted, once Molina received the information requested from the employer, Kastens no longer needed to provide any additional information. (Tr. 577:14-15) The cases cited by the ALJ do not support his conclusion that the Union's actions were arbitrary.[19]

In this case, the Union processed and settled Kastens's grievance, then informed him of the outcome. The Union did not lie to or misinform Kastens, and he was satisfied with the amount of information gathered by Molina. However, the ALJ concluded that Molina sought to keep Kastens uninformed by "convincing a reluctant company manager to agree to a settlement without Kastens' signature." (ALJD 15:24-25) There is simply no evidence to support this leap of logic.

The record shows that Jeff Clark first e-mailed a draft settlement to Molina on May 8, 2014 that "gets the concurrence of the individuals," and four days later he e-mailed Molina with "updates to the settlements that removes the grievant release." (GC Ex. 15) Counsel for the General Counsel presented no testimony with respect to the parties' positions concerning Kastens execution of the settlement agreement. Even if Molina had pressed for removal of Kastens's release, this would not constitute an attempt to keep him uninformed. The duty of fair representation does not require a union to follow particular procedures, *Douglas Aircraft Co*., 307 NLRB 536, 557 (1992), and no employee consent is necessary before a grievance is settled. And Kastens was informed of the outcome as soon as a settlement was reached.

[19] *See and cf. Serv. Employees Local 3036 (Linden Maint.),* 280 NLRB 995 (1986) (union told grievant it would process grievance, then refused employer's offer of part-time employment, abandoned grievance entirely and never informed grievant); *Union of Sec. Pers. of Hospitals*, 267 NLRB 974 (1983) (union failed to timely file grievance, lied and told employee it would process grievance to arbitration, then abandoned it); *Yellow Freight Sys. of Indiana*, 327 NLRB 996 (1999).

Finally, the General Counsel presented an e-mail chain between Molina and his assistants in which Molina instructed them not to release paperwork from the grievance file to Kastens without Molina's approval. (GC Ex. 10) Molina did not want to release documents to Kastens because the Charging Party was known to "advertis[e] everything he did online." (Tr. 44:7-45:12) The ALJ concluded this was a legitimate reason to control the release of information to Kastens (ALJD 9 n.52), so this e-mail chain cannot support a finding of any breach of the Union's duty of fair representation. At all relevant times Molina communicated with Kastens sufficiently to effectively process his grievance.

3. Kastens' Grievance Lacked Merit

The ALJ failed to recognize that Kastens's discharge grievance was entirely without merit, and Counsel for the General Counsel presented no evidence that the Union had a chance of prevailing in arbitration. The Union determined that Kastens would not prevail in arbitration because (1) his admitted violation was a first-time terminable offense; (2) his disciplinary history made discharge automatic; and (3) he was subject to a last chance condition. Rather than being deferential to the Union's substantive analysis regarding its chances of success in arbitration, the ALJ misapplied the law and replaced the Union's thoughtful judgment with his own.[20]

a. Kastens Committed a First-Time Terminable Offense

By forwarding an e-mail with confidential security video to approximately 71 different e-mail addresses, 11 of which were external to the employer's e-mail system, Kastens violated Spirit's *Release of Information* policy, OP2-17. (Jt. Ex 13; Tr. 514:7-20) Under the Company's Disciplinary Guidelines, these actions are designated as an offense which warrants termination in

[20] Because the grievance was shown to be entirely meritless, and because Kastens would have been discharged automatically absent any Union action, the ALJ erred in ordering the Union to request that Spirit reinstate Kastens or arbitrate his grievance. (ALJD 17:36-43) These remedies would be inappropriate even if the Union had arbitrarily or discriminatorily processed Kastens's grievance.

the first instance. (Jt. Ex. 14 at 7) Justin Welner testified that Spirit has consistently discharged other employees for the same or similar first-time terminable offenses. (Tr. 517:6-15) Hammond advised Molina that Kastens had committed a "one-time offense" for which other employees had been immediately discharged. (Tr. 496:12-14) Kastens never denied his gross misconduct, and he admitted at hearing that his actions violated Company policy. (Tr. 196:22-197:3, 195:2-9)[21]

b. Kastens's Discharge Was Automatic Under Spirit's Disciplinary Guidelines

Kastens's disciplinary history made termination automatic for any violation of Spirit policy. Kastens had already received four disciplinary actions for misconduct in the 12 months before his discharge. (Jt. Ex. 10 at 2-5) Under the Company's Disciplinary Guidelines, the following is described as a one-time offense warranting termination:

> M. Generally unacceptable conduct where the employee had accumulated four disciplinary actions within a year, and received a fifth disciplinary action for any reason during the year following the fourth disciplinary action.

(Jt. Ex. 14 at 7). Kastens conceded these prior disciplinary actions at hearing. (Tr. 195:10-16)

Kastens's past disciplinary forms were designated as closed. Hammond testified that it was his understanding those matters were closed and included in Spirit's personnel records. (Jt. Ex. 10 at 2-5, Tr. 505:8-22) Hammond relied in part on these past disciplinary actions in concluding that the Union could not prevail in arbitration. (Tr. 496:14-15) And Kastens admitted that at the time he disseminated the video, he had "four disciplinary actions on [his] record." (Tr. 195:10-16) The General Counsel introduced no evidence suggesting that the prior disciplines were not included in Kastens's permanent record or that the prior grievances were still active.[22] Thus, the record establishes that these prior grievances were closed, not active.

[21] The ALJ conceded that Kastens's violations subjected him to summary discharge (ALJD 7 n.41)

[22] Welner confirmed that if the Company lessened the severity of a discipline or agreed to remove it from an employee's record, this would be reflected in the employee's personnel file. (Tr. 521:2-17)

However, the ALJ completely disregarded the relevant joint exhibits and uncontroverted testimony and concluded that "the November and December 2013 suspensions were still active grievances." (ALJD 8 n.50, 9 n.51) He then relied on this mischaracterization of the evidence to discredit all of Hammond and Molina's testimony regarding their consultation about Kastens's grievance, stating that Molina failed to provide Hammond all relevant information and that the attorney's understanding of the facts was flawed. (ALJD 9:5-7, n.51) The ALJ also stated that "Molina mischaracterized the nature of Kastens' situation." (ALJD 8 n.50) Finally, the ALJ referenced these purportedly active grievances in finding that the Union processed Kastens's discharge grievance in bad faith. (ALJD 16:1-5) The ALJ's factual and legal findings are contrary to the evidence and should be rejected.

c. Kastens Was Subject to a Last Chance Condition

The Union could not have prevailed in arbitration because Kastens was subject to a last chance agreement (*LCA*). An LCA is an agreement or condition by which the employer gives up its contended right to immediately discharge an employee and the employee in turn forfeits, during a limited period, negotiated rights regarding future discipline. *Ingersoll-Dresser Pump Co.*, 114 LA 297, 301 (Bickner, 1999). These provisions are strictly construed in arbitration, so an arbitrator may only consider whether the employee violated the LCA. For this reason, most arbitrators uphold discharges that occurred when an LCA was in place. *See id.;* Elkouri & Elkouri, *How Arbitration Works* 15-49 – 15-52 (7th Ed. 2012) (compiling arbitration awards).

In this case, a binding LCA was entered. When Spirit prepared its disciplinary action form against Kastens on December 6, 2013, management arguably had the right to discharge him immediately under its progressive discipline policy. (Jt. Exhibits 10 at 2; 14) Due solely to the efforts of Frank Molina, Spirit instead decided to designate the time during which Kastens had

been off work as a disciplinary suspension, and included the following language in the disciplinary memo: "[I]f you receive any type of discipline in the next 12 months, you will be terminated for generally unacceptable misconduct." (Jt. Ex. 10 at 2; Tr. 462:25-464:4)

The ALJ decided that this LCA was not binding because Kastens did not agree to the condition when he signed the disciplinary form. (ALJD 8 n.50) But Molina negotiated and agreed to the LCA in order to save Kastens's job in December 2013 – which is sufficient to make the LCA binding – and all parties signed the document. (Jt. Ex. 10 at 2) Molina testified that Spirit puts some, but not all, LCAs in a formal document; and both Molina and Hammond testified that the disciplinary memo included a last chance condition. (Tr. 504:10-25, 124:1-5) This rational conclusion that Kastens's LCA was binding, based on Molina's research and Hammond's experience, convinced Molina that a challenge to Kastens's discharge could not succeed in arbitration. (Tr. 497:24-498:16, 555:1-15; Resp. Ex. 11)

The ALJ substituted his own judgment for that of the Union's discretion and asserted this was not a binding LCA.[23] (ALJD 8 n.50, 9 n.51, 10 n.9, 15:29-31, 16:1-5) The ALJ distorted the facts and disregarded Board law, which requires great deference to a union's judgment and performance. And even if the Union was incorrect in its determination that Kastens was subject to an LCA, this is immaterial. It is axiomatic that mere negligence, the exercise of poor judgment, or ineptitude on the part of the union is insufficient to support a finding of arbitrary conduct. *Amalgamated Transit Union Local No. 1498*, 360 NLRB No. 96 (2014). Thus, the Union's reliance on the LCA would only support a finding of a violation of the Act if the Union's conclusion was wholly arbitrary or capricious. Respondents reached a rational (and correct) conclusion that the Union would not prevail in arbitration. The ALJ erred in deciding

[23] The ALJ based this determination in part on his finding that Kastens's December 2013 suspension was still open and subject to an active grievance; but this conclusion was contrary to all of the evidence presented.

that these actions were perfunctory and arbitrary.

B. The Union Did Not Process Kastens's Grievance Discriminatorily or in Bad Faith

The ALJ further stated that "[o]ther evidence also indicates that the Union failed to exercise its discretion in good faith" and that the Union "mishandled [Kastens's] grievances for invidious reasons." (ALJD 15:34-37) For good measure, the ALJ also concluded that the Union discriminatorily processed the grievances. (ALJD 16:16-17) The ALJ's finding of bad faith was implied in part through his previous determination that the Union acted with animus against Kastens when Johnson forwarded the accident video to Spirit management, bolstering the flawed conclusion that all of the Union's actions were discriminatory. (ALJD 15:36-38)

An examination of alleged discrimination in the context of the duty of fair representation "requires inquiry into the subjective motivation behind union action." *Trnka v. Auto Workers*, 30 F.3d 60, 63 (7th Cir. 1994). The General Counsel's case "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Transit Union v. Lockridge*, 403 U.S. 274, 301 (1971). Only acts of disparate treatment which are motivated by hostile, invidious, irrelevant, or unfair considerations are proscribed. *Steelworkers Local 2869 (Kaiser Steel Corp.)*, 239 NLRB 982, 982 (1978).

In order to make a prima facie case of discriminatory processing in violation of Section 8(b)(1)(A), the General Counsel was required to adduce proof of Kastens's protected activity, Union knowledge of that activity, and Union animus against him because of that activity. *Machinists Dist. 751 (Boeing Co.)*, 270 NLRB 1059, 1065 (1984); *Wright Line*, 251 NLRB 1083.[24] Even assuming the first two prongs were proved in this case, no evidence was ever

[24] The ALJ stated that "[c]ontrary to the Union's assertion, a showing of animus is not a necessary element of an 8(b)(1)(A) claim." (ALJD 15 n.66) But where that claim alleges that the union acted discriminatorily, animus is a necessary element.

offered to suggest that Molina acted with animus against Kastens during the grievance procedure. The ALJ found that Howard Johnson had no involvement in processing Kastens's grievance. (ALJD 8 n.45) Thus, the General Counsel was required to show that Molina, as the sole official responsible for processing and settling Kastens's grievance, mishandled the grievance because of his alleged animus.

Here, the General Counsel failed to adduce any evidence whatsoever of discrimination that was intentional, severe, and unrelated to legitimate union objectives. No evidence was ever presented to prove any animus on the part of Molina or nay other Union official with respect to processing the grievance. But even if there were some evidence of hostility by Molina, this would not show the requisite causation for a prima facie case:

> The key question is whether there was any causal connection between the Union's hostility against [the charging party] because of his protected activity and its failure to process his grievance . . . Here the only evidence of hostility were the remarks of the shop steward and the business representative to Goddard . . . Those remarks are much less important than the actions the Union actually took with regard to the discharge.

Id. at 1066. In this case, the Union followed its standard procedures, investigated the grievance thoroughly, reached rational conclusions, and settled Kastens's grievance on a reasonable basis. The General Counsel failed to establish a prima facie case of discriminatory processing of the grievance.

The ALJ also inferred bad faith by concluding that Spirit was not genuinely steadfast in its insistence on discharging Kastens during grievance negotiations with Molina. (ALJD 15:40-42) This conclusion defies logic and ignores all relevant evidence. Molina credibly testified that he initially sought reinstatement for Kastens, but the employer adamantly refused. (Tr. 562:3-13, 563:2-6, 562:12-18) Molina's testimony was not controverted, and there was no reason to question its accuracy. Indeed, the ALJ accepted the fact that Spirit sought to discharge Kastens in

December 2013 for his prior misconduct (ALJD 5:7-13), which supports the conclusion that it would insist upon an automatic discharge when he later committed even more egregious policy violations in January 2014. Rather than accepting this uncontroverted testimony, the ALJ found that Molina's testimony was undermined by the testimony of Justin Welner, who testified that he was not involved extensively in the events surrounding Kastens's discharge. (ALJD 15:40-42; Tr. 515:13-24) Welner did not contradict Molina's testimony. Rather, the evidence shows that Molina discussed possible settlement options with Clark. (GC Exhibits 9, 15; Tr. 99:14-100:16)

Finally, the ALJ based his finding of bad faith on his conclusion that "Molina treated two unresolved disciplines of Kastens, including a 'last chance' suspension/warning,' as a fait accompli on Kastens' record." (ALJD 16:1-2) But there is no evidence supporting the ALJ's assumption that the prior grievances were still active, so his conclusion is erroneous.

C. The Union Would Have Taken the Same Actions in Processing and Settling the Grievance Absent Any Protected Activity by Kastens

Assuming for the purpose of argument that a prima facie case of discriminatory or bad faith grievance processing was made, the Union proved that it would have taken the same actions regarding the grievance absent any protected activity by Kastens, thereby rebutting the prima facie case. *See United Paperworkers Int'l Union*, 323 NLRB 1042, 1044 (1997).

The ALJ clearly erred when he stated that the Union "mishandled" Kastens's grievance. But the Union processed the grievance thoughtfully and it reached the best possible resolution on behalf of Kastens. As the Supreme Court has stated, "the [grievance] settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement." *Vaca*, 386 U.S. at 191. "In labor disputes, as in other kinds of litigation, even a bad settlement may be more advantageous in the long run than a good lawsuit." *Air Line Pilots Ass'n*, 499 U.S. at 81. Settlement of a meritless

grievance does not constitute abandonment or mishandling of the grievance. The Union would have taken the same steps to investigate, process and eventually settle Kastens's grievance even if he had never engaged in dissident union activity. Accordingly, there is no statutory violation.

Conclusion

For the reasons set forth above in support of *Respondents' Exceptions to the Decision and Order of the Administrative Law Judge*, the Board should reject the ALJ's findings and conclusions and dismiss the amended complaint.

Dated June 10, 2015.

Respectfully submitted,

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Certificate of Service

The undersigned attorney certifies that on June 10, 2015, he served the foregoing document on the Board, Office of the Executive Secretary, Region 14/Subregion 17, and Counsel for the General Counsel via electronic filing and on the parties listed below via electronic mail.

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